85-1570

No.

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

==========

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

IN RE GEORGE ABDALLAH

RICHARD DRURY, ADMINISTRATOR OF THE ESTATE
OF MARY T. ABDALLAH, Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

S.James Boumil
100 Summit Street
Lowell,MA, 01852
(617) 458-0507
ATTORNEY FOR THE PETITIONER

==========

165pp

1. Whether a District Court remand upon appeal to it of a final order of a bankruptcy court is itself a final order for the purposes of 28 USC s. 158.

(a) Whether the District Court order, if not final in a technical sense, nevertheless determined issues of law fundamental to the further outcome of the case and therefore should be treated as final under the holding of Gillespie, Administratrix v United States Steel Corp. 379 U.S. 148 (1964)

2. The Trustee in Bankruptcy proposes a sale of real estate under 11 USC 363 & 725. The non debtor spouse of the bankrupt objects but her duly appointed state court receiver consents.

(a) Given that under state law the receiver has the right to control the property, does the order of the District

Court granting standing to the non debtor spouse to contest the sale in the bankruptcy court violate 28 USC 1738 [full faith and credit] or 28 USC 2338 [anti-injunction].

3. Whether upon filing of a bankruptcy petition any tenancy by the entirety or other joint interest in property of the debtor is severed, such that the death of the debtor subsequent to filing does not divest the bankrupt estate of the interest it held at filing.

LIST OF OTHER PARTIES

The only other parties are those with separate appeals filed on the same issue in companion cases consolidated below for argument and briefing. They are: Donahue & Donahue (1st Cir #85-1105; Allen H. Roffman,Trustee (1st Cir #85-1152).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and Statutory provisions involved	2
Statement	4
Reasons for granting the petition	16
Conclusion	65
APPENDIX	
Memorandum of Bankruptcy Court	A- 1
Order of Bankruptcy Court	A-23
Memorandum and Order, District Court	A-24
Decision, 1st Cir.	A-35
Judgment, 1st Cir.	A-42
Corrected Judgment, 1st Cir.	A-42a
Order, 1st Cir.	A-43
Order, 1st Cir.	A-45
Order, 1st Cir.	A-45a
Text, United States Constitution Art.1, S.8, Clause 4	A-46
Text, 11 USC s.363	A-47
Text, 11 USC s.725	A-51
Text, 28 USC s.1293	A-52
Text, 28 USC s.158	A-53
Text, 28 USC s.1738	A-55a
Text, 28 USC s.2283	A-55c
Text, Rule 1016	A-56
House Report No. 96-1195 (releveant excerpts)	A-57
Motion of Trustee for Leave to Sell at Public Auction	A-65
Motion to Compel Sale of Assets	A-71
Order Appointing Receiver	A-75
Transcript of Testimony of Eva Abdallah (2/14/79)	A-79
Case No. 80-01759-L Transcript 1/12/83	A-83
Case No. 80-1759 Transcript 5/25/83	A-85

Memorandum and Order of Appeals
Court of Massachusetts A-90

TABLE OF AUTHORITIES

Cases

Atlantic Coast Line Railroad Co.
v. Brotherhood of Locomotive
Engineers 398 US 281, 287
(1970)..... 46
Cohen v. Beneficial Loan Corp.
337 US 541 (1948)..... 33,34
F.H.A. v. The Darlington, Inc.
358 US 84 (1958)..... 57
Fauci v. Mulready 337 Mass. 532
(1958)..... 39,40
Gillespie v. US Steel Corp.
379 US 148 (1964)..... 33
In re Abdallah, 778 F.2d 75,76
(1st Cir. 1985)..... 8,17,22,
23, 26,30,31,35,36
In re American Colonial Broadcasting
Corp. 758 F.2d 794 (1st
Cir. 1985)..... 32
In re Bestmann 720 F.2d 484
(8th Cir. 1983)..... 19,32
In re Bildisco 682 F.2d 72
(3ed Cir. 1982)..... 19
In re Cormer 716 F.2d 168
(3ed Cir. 1983)..... 21
In re Exennium, Inc. 715 F.2d
1401 (9th Cir. 1983)..... 34
In re Four Seas Center, Ltd. 754
F.2d 1416 (9th cir. 1985).... 28
In re Friedman 34 BR 275
(Bkrtcy 1984)..... 54
In re Leimer 724 F.2d 744
(8th Cir. 1984)..... 21
In re Levenhar 24 BR 331 (1982).. 52
In re Martinez 721 F.2d 262 (9th
Cir. 1983)..... 20,21,22
24,28,32,63
In re Saco Local Development

Corp. 711 F.2d 441 (1st Cir. 1983)..... 21
In re Sambo's Restaurants, Inc. 754 F.2d 811 (9th Cir. 1985). 23,24,32
In re Stanton 766 F.2d 1283 (9th Cir. 1985)..... 25,27,28 29,32
In re TCL Investors 775 F.2s 1516, 1518-19 (11th Cir. 1985)..... 18
Kremer v. Chemical Construction Corp. 456 US 461 (1982)..... 43,44
McGowan v. McGowan 14 Grey 119 121 (1859)..... 63
Matter of Barker 768 F.2d 191 7th Cir (1985)..... 29
Matter of Commercial Contractors Inc. 771 F.2d 1373, 1374-5 (10th cir. 1985)..... 18
Matter of Marin Motor Oil, Inc. 689 F.2d 445,448 (3ed cir. (1982)..... 18,19,23 24,31
Matter of Mobile Steel Co. 563 F.2d 692,699 (1977)..... 53
Matter of Riggsby 745 F.2d 1153,1156 (7th Cir. 1984).... 17,24,28 29,32
Northern Pipeline Construction Co. v Marathon Pipe Line Company 458 US 50 (1982) 15
Perez v. Boston Housing Authority 379 Mass. 703 (1980)..... 39
Perez v. Campbell 402 US 637 652 (1971)..... 56
Seatrain Shipbuilding v. Shell Oil Co. 444 US 572 (1979).... 57
Sioux Tribe v. US 316 US 317 329-330 (1941)..... 57
Skehill v. Abbott 184 Mass 145 (1903)..... 63
Universal Minerals, Inc. v. C.A. Hughes and Co. 669 F.2d 98, 101-02 (3ed Cir. 1981)... 19,20

Wax v. Monks 321 Mass 1 (1957)... 37
Wedgewood v. Fibreboard Corp.
706 F.2d..... 42
Wellman v. North 256 Mass. 496
(1926)..... 36,37
Williford v. Armstrong World
Industries, Inc. 715 F.2d
124 (4th Cir. 1983)..... 43

Constitution and Statutes

11 USC 26..... 49
11 USC 363..... 2,4,10,
16,22,27,31,35,37,
40,42,50,51,52,54,
55,56,58,60,61,64,
65
11 USC 522..... 54
11 USC 725..... 2,10
28 USC 158..... 3,4,16,
17,32
18 USC 1291..... 21
28 USC 1293..... 3,17,32
28 USC 1738..... 3,39,43,
44
28 USC 2075..... 53,54
28 USC 2283..... 3,46

Bankruptcy Act of 1898..... 49

Bankruptcy Act of 1978 (92 Stat 2549) Pub.
L. 95-598 2,57,61

Bankruptcy Amendments and Federal
Judgeship Act of 1984 (98- Stat. 333) Pub.
L. 98-353..... 3,4,15,54,58

Miscellaneous

Supreme Court Rule 17.....35,
Bankruptcy Rule 1016.....3,53,
H.R.Rep. 95-595..... 50,53
H.R.Rep. 96-1195, 9th Cong..... 3,38,39,
56,57,58,61

I.R.S. Regulations 25.2512-9(f).. 62
69 Mass.L.Rev. 156,178 (1984).... 37
20 ALR 3ed 967..... 42
66 Am Jur 2nd Section 201..... 41
West's Massachusetts Practice, Volume 31, Nolan, page 294..... 41
Webster's 3ed Edition New International Dictionary, Unabridged, (G. & C. Merriam, publisher, 1968).....63

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No.

IN RE GEORGE ABDALLAH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Richard Drury, Administrator of the Estate of Mary T. Abdallah and majority creditor of the debtor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 778 F.2d 75 (1985) [Appendix, infra, A-35 to A-41]. The opinion of the District Court is reported at 46 B.R. 718 (D.C. 1984) and is otherwise unreported [Appendix, infra, A-24 to A-34]. The opinion of the Bankruptcy Court is reported at 39 B.R.

384 (Bkrtcy. 1984) and is otherwise unreported [Appendix A-1 to A-23]

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1985 [A-42]. A timely petition for rehearing or rehearing *en banc* was denied on December 31, 1985 [A-43 to A-45] and a corrected judgment issued [A-42a]. The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Bankruptcy Clause (Article I s. 8 cl. 4) and the Full Faith and Credit Clause (Article IV s. 1). The statutory provisions involved are: 11 USC 363 & 725 (Pub. L. 95-598, 92 Stat 2572 & 2607) ; Amendment to 11 USC 363 by s. 442 of Pub.

L. 98-353, 98 Stat 333; 28 USC s 158 (added by s.104 of Pub. L. 98-353, 98 Stat 333 "Bankruptcy Amendments and Federal Judgeship Act of 1984"); 28 USC s. 1293 (Pub. L. 95-598 s. 236(a), 92 Stat. 2667); 28 USC 1738 (c. 646, 62 Stat. 947 deriving from Act of May 26, 1790, ch. 11, 1 Stat. 122); 28 USC 2283

In addition: Bankruptcy Rule 1016; House Report 96-1195,96th Congress 2nd Session, together with proposed S. 658.

The pertinent texts of the foregoing are set forth in the Appendix.

STATEMENT OF THE CASE

Section 112(a) of the Bankruptcy Amendments and Federal Judgeship act of 1984 (P.L. 98-353, codified as 28.U.S.C.158-see Appendix page A-53 for text) governs appeals of bankruptcy matters from the District Courts to the Courts of Appeals. This section became effective on July 10, 1984. On December 27, 1984 Skinner, D.J. for the United States District Court of the District of Massachusetts, reversing in part the decision of Bankruptcy Judge Thomas Lawless issued on April 12, 1984, remanded the case to the Bankruptcy Court. The remand was for a hearing to determine whether a claimed tenancy by the entirety in real estate sought to be sold by the Trustee in Bankruptcy pursuant to 11 U.S.C.363(h) [see page A-47 for text] was valid or a sham in fraud of creditors.

On December 2, 1985 the Court of Appeals for the First Circuit issued a judgment dismissing the appeal of your Petitioner "without prejudice" as premature and reserved judgment on the three specific questions of law raised by Petitioner [A-38]. On December 16, 1985 Petitioner filed a motion for rehearing en banc or rehearing. This was denied in part by the Court of Appeals through its Order issued on December 31, 1985 [A-42], The judgments of dismissal entered on December 8, 1985 with respect to Appellants Donahue and Donahue (creditor) and Allen H. Roffman, Trustee were modified to remand to the District Court to find and determine whether these Appellants had timely appeals from the Bankruptcy Court.[A-45a&b].

Your Petitioner Richard Drury is the Administrator of the Estate of Mary T. Abdallah. Mrs. Abdallah died in 1965 leaving four heirs, one of whom was the Debtor George Abdallah who had served as the first administrator of her estate. In 1968 the Probate Court of Massachusetts (Middlesex County) issued a judgment and findings against George Abdallah charging him with misappropriation of assets from his mother's estate while serving as Administrator of that Estate. Following a series of unsuccessful appeals final judgment was entered against George Abdallah on April 10, 1978.

Execution was granted on the final judgment of the Massachusetts Probate Court, and levy thereon was recorded (in

the Middlesex County Registry of Deeds) against all real property of the Debtor in June of 1978. In November of 1978 the Debtor and his wife Eva Abdallah (Appellee below) recorded a deed purporting to grant all of the real property which was later to become the subject of the Trustee's Motion to Sell, to one Deborah Hulslander then a college student resident in New Hampshire. On February 2, 1979 a purported deed back to the Debtor and his wife Eva as "tenants by the entirety" was recorded in Middlesex North Deeds Book 2349 Page 406, the recording being immediately prior to the hearing in Lowell District Court Supplementary Procees action SP-29443 called to enforce payment of the judgment against all assets of the Debtor.

On February 14, 1979 Eva Abdallah, wife the the Debtor was called as a witness in SP-29443 and interrogated

concerning her alleged "tenancy by the entirety". She testified variously that she paid nothing for any such interests, knew nothing of them, or simply did not have any such interest.[A-79 to A-82].

A series of State Court actions followed against the Debtor and his wife, Eva Abdallah, in an effort to collect upon the judgments, which then stood at about $175,000 including interest and Court awarded counsel fees. As a result the Debtor and his wife were both placed in State Court Receivership [A-75].

Bankruptcy Proceeding

On October 8, 1980, the Debtor filed a Chapter 7 proceeding under the then new Bankruptcy Code. The Debtor selected his Federal exemptions under Section 522 of the code. It was docketed as a "no asset" case. Creditors Drury (Appellant here) and Donahue and Donahue filed Adversary Proceedings in the Bankruptcy Court

(A80-0762 and A80-0788) alleging among other things that their debts were not dischargeable as a matter of law and that the Debtor had filed false, fraudulent and misleading schedules with the Bankruptcy Court and was concealing assets from the Court. The Debtor entered general denials. Appellant Drury and Donahue and Donahue represent the majority indebtedness listed by the Debtor.

Immediately after the Chapter 7 filing, your Petitioner commenced extensive discovery including several depositions of the Debtor and his relatives, portions of which appear as exhibits in various sections of the record below on appeal.

The purpose of the discovery was to assist in locating any concealed assets of the Debtor and to ascertain the claimed contribution of the debtor husband and his non-debtor spouse to alleged tenancies

by the entirety - in preparation for a Section 363 sale.

On July 28, 1981, the Debtor died. On September 21, 1981 the Trustee sought leave of Court to employ special counsel for the purpose of initiating and conducting a sale of the Debtor's real property under Section 363 of the Code. On July 30, 1982 the Trustee filed an Adversarial Motion to sell assets under Section 363(h) and Section 725 of the Code [A-65].

Counsel to Eva Abdallah filed a pleading claiming a valid tenancy by the entirety and demanding a jury trial. Counsel to Petitioner Drury filed claims that Eva Abdallah was merely a straw for the Debtor.

The Trustee's Motion to Sell first came before the Bankruptcy Court on January 12, 1983. After hearing a preliminary report by the Trustee that a

title examination indicated the status of the title to the subject properties to be "hopeless", Judge Lawless sought appointment of a special master to find facts concerning the title. The parties could not reach agreement on how the master was to be compensated, and Judge Lawless took the Trustee's Motion off the list and continued it generally. [Transcript 1/12/83, page A-84 hereto].

The matter then sat dormant for a few months with further discovery proceeding. A hearing on other matters was scheduled for 5/25/83. At that hearing Judge Lawless raised the issue of the tenancy by the entirety sua sponte, stating that it was his opinion that after the filing the tenancy by the entirety is to be treated as a tenancy in common [Transcript 5/25/83, p. A-86 hereto]. Speaking of the Debtor's surviving wife and the tenancy by the entirety Judge Lawless then offers the

following:

THE COURT: "...when the husband died, at some point she has a converted tenancy by the entirety. In a tenancy in common that's where she is." [Transcript 5/25/83 Pg. A-86].

And again speaking of the Debtor, his wife, and their alleged tenancy by the entirety:

THE COURT: "...He died, and he leaves a widow. And when the tenancy by the entirety was converted to a tenancy in common, she has some rights." [Transcript 5/23/83, Pg. A-87].

The Court then goes on in several places to invite the issue of tenancy by the entirety back before the court for a definitive ruling, for example:

THE COURT: "Why don't you file some kind of pleadings, and I will at least dispose of that". [Transcript 5/25/83, Pg. A-86].

AND CONTINUING:

THE COURT: "...If you will listen to me, you will see what I am talking about. And you will get something in front of me that asks me to define the title to this property. And I will do it....
I think you're at cross purposes, and you're going to stay there forever, unless you do what I tell you." [Transcript 5/25/83, Pg. A-87].

Following the rather explicit request of the court as set forth above, your Appellant filed a Motion on 6/13/83 [A- 71] requesting that the Trustee's Motion for Sale which has been continued generally because of the prior reluctance of the court to deal with title questions be brought forward for decision.

A hearing was scheduled for 12/14/83. The issue then was stated in Judge Lawless' order of 4/12/84 thusly:

> "The issue before the Court is whether the trustee can sell, pursuant to 11 U.S.C. Section 363(h), property what was held by the debtor and his non-debtor spouse as tenants by the entirety on the day of the bankruptcy filing where the debtor died prior to the filing and allowance of Section 363 (h) action." [Memorandum/Order, Page 1, A- 1].

Only arguments of law concerning tenancies by the entirety were allowed by the Court, not testimony concerning whether this was such a tenancy. On April 12, 1984, Judge Lawless signed the

Memorandum-Order set forth in Appendix page A-1 to A-23 hereto holding that as a matter of law upon the death of the Debtor the wife took all tenancy by the entirety property free of the bankruptcy proceeding. This disposed of both the Petitioner Drury's Motion and removed the only major assets of the Bankrupt Estate from the jurisdiction of the court. Thereupon Appellant Drury, the Trustee in Bankruptcy, and other interested Creditors filed an appeal to the District Court. On 12/27/84 Judge Skinner issued his decision agreeing with Judge Lawless' conclusion concerning the fate of a tenancy by the entirety after the death of the debtor, but determined that: federal rather than state law controlled, and remanded the case for a hearing to determine the real parties in interest in the properties involved including whether a tenancy by the entirety existed [Judge Skinner's

Memorandum is set forth starting at Pg. [A-24].

Appeals to the First Circuit followed Judge Skinner's decision, claiming as error: (a) Judge Skinner's holding divesting the bankrupt estate of any tenancy by the entirety property; (b) The refusal of the District Court to honor the Order of the Massachusetts Superior Court [A-75] appointing a receiver over all assets claimed by Eva Abdallah; (c) constitutional arguments concerning the post Northern Pipeline jurisdiction of the Bankruptcy Court and expiration of the terms of the bankruptcy court judges after the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. 98-353). Item (c) is not a subject of this petition.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning: (A) whether a District Court remand upon appeal to it of a final order of a bankruptcy court is itself a final order for the purposes of 28 U.S.C.s.158 and; (B) whether a state court receiver of a claimed co-tenant or the claimed co-tenant has standing under 11 U.S.C.363 to protest the Trustee's proposed sale of real property; and (C) whether the interest of a debtor in a tenancy by the entirety remains property of the bankrupt estate after the death of the debtor.

(A) Is the decision of the District Court "final" under 28 U.S.C. s. 158 ?

There is a serious and clear division in the Circuits concerning the circumstances under which a remand order from a district court, following an appeal from a final order of a bankruptcy court, is itself final for the purposes of appeal

to a Circuit Court under jurisdiction granted by 28 U.S.C.s.158(a). In its decision in this case, the First Circuit believes itself to be adopting the position of the Seventh Circuit which has held that if a district court decision remands the case to the bankruptcy court for "significant further proceedings" the right to appeal should not be automatic under 28 U.S.C.s.158(d) [or its predecessor 28 U.S.C.s.1293(b)]. Matter of Riggsby 745 F.2d 1153,1156 (7th Cir. 1984), In Re Abdallah 778 F.2d 75,76 (1st Cir. 1985) [see page A-35 hereto].

A clearly opposite position has been adopted by the Third Circuit which has held that where the bankruptcy court order underlying the district court's action is final, a reversal by the district court resulting in further proceedings in the bankruptcy court is a final appealable order under 28 U.S.C.s.1293 [predecessor

to 28 U.S.C.s.158]. Matter of Marin Motor Oil, Inc. 689 F.2d 445,448 (3ed Cir. 1982). This divergence of view among the Circuits is discussed by the Tenth Circuit in Matter of Commercial Contractors, Inc. 771 F.2d 1373, 1374-5 (10th Cir. 1985); In Re TCL Investors 775 F. 2d 1516, 1518-19 (11th Cir. 1985).

Those Circuits, such as the Third, the Ninth, and the Eighth, which have adopted the position urged by your Petitioner, have construed the *function* of the Courts of appeals within the bankruptcy process as being different than those Circuits which have considered a remand as not final absent exceptional circumstances. For example, the Third Circuit in holding a remand by a district court (for the conduct of two full adversary proceedings to be held in the bankruptcy court) articulated its role in the bankruptcy appellate process thusly:

> "...*Bildisco's* point that there is an identity of roles between the court of appeals and the district court in bankruptcy appeals strongly suggests that when the district court reviews a final order of the bankruptcy court, and we then review the district court's determination with respect to the bankruptcy court's order, we are in essence reviewing a final order of the bankruptcy court" Marin, supra at 448, citing In re Bildisco 682 F.2d 72 (3ed Cir. 1982).

To the same effect is Universal Minerals, Inc. v. C.A. Hughes and Co. 669 F.2d 98, 101-02 (3ed Cir. 1981) which places the district court and the courts of appeals in the same position with respect to reviewing a final decision of a bankruptcy court.

The Eighth Circuit through its decision in In Re Bestmann 720 F.2d 484 (8th cir. 1983) also focuses upon the nature of the decision by the bankruptcy court. If its order is final so is a decision of the district court which leaves nothing for the district court to do. Bestmann, supra, at 486-87. Likewise

Universal Minerals, supra, at 101 looked to whether the district court order left proceedings ongoing in the district court. In our case the decision of the district court held that the bankruptcy court order finally determined separable issues (standing of the receiver, the fate of any entireties property) [A-26] .

In a series of cases which focus on the *purpose* for which the remand is made by the district court, the Ninth Circuit has brought a further evolution in the divergence of views among the Circuits concerning the proper application of the "finality" requirement to decisions in the bankruptcy context. We commence with In Re Martinez 721 F. 2d 262 (9th Cir. 1983). Martinez at first glance appears to be on point with our case. The underlying question concerned the priority of a homestead exemption and a lien. The answer depended upon the nature of the

title held by the debtor and his spouse in the subject real property -- whether community or joint tenancy. The bankruptcy court had neglected to make findings concerning the issue and the district court remanded for this "critical" determination. Martinez, supra, at 265. Martinez adopted the view, universally urged by other Circuits, that "finality" in the bankruptcy context is to be more flexibly construed than under 28 U.S.C. s. 1291 [See In Re Saco Local Development Corp. 711 F. 2.d 441 (1st Cir. 1983);In Re Cormer 716 F. 2d 168 (3ed Cir. 1983); In Re Leimer 724 F. 2d 744 (8th Cir. 1984)]. However Martinez went on to urge that concerning factual determinations traditional Section 1291 standards would apply. Martinez at 265. Certainly our case will at some point involve a determination of the nature of the title, if any, claimed by the non-debtor spouse in the

real property which is to be the subject of the Trustee's Motion to Sell under 11 U.S.C. 363. See Abdallah, supra, at 76-77 [Appendix, page 38].

If nothing more were involved your Petitioner would be inclined to accept the logic of Martinez and await further proceedings below pursuant to the remand. However, decisions of the Ninth Circuit subsequent to both Martinez and our case, Abdallah, differentiate between orders of a district court involving remands for purely factual determinations and those which settle substantive questions of law effecting the rights of the parties and the course of the proceeding. Although the remand in Abdallah will surely involve factual issues, these issues are inextricably interwoven into final and substantive legal determinations made by the district court, and upon which the First Cicuit "reserved" judgment.

Abdallah, supra at 77; page A-38-39.

In Re Sambo's Restaurants, Inc. 754 F. 2d 811 (9th Cir. 1985) reversed a bankruptcy court denial of a creditor's motion to amend a proof of claim. The order of the bankruptcy court put the creditor "out of court", and therefore was final for all purposes. The reversal of the district court resulted in further proceedings being conducted in the bankruptcy court, including a full adversary hearing. Agreeing with the Third Circuit's reasoning in Marin, the Ninth Circuit held that "our role and that of the district court is essentially the same in this appellate process" Sambo's, supra, at 814.

Sambo's concluded that the rational of the "finality" doctrine derived from the proper relationship between a court established to find facts and one whose function it is to review those findings. "Those reasons are unpersuasive when one

appellate court is reviewing another lower appellate court rather than the decision of a fact finder" Sambo's, supra, at 814.

Thus far we have witnessed three distinct approaches to the "finality" doctrine among the Circuits, as applied to district court orders: (a) remand for "significant further proceedings", not final as in Riggsby; (b) if the bankruptcy court order is final, then the remand by the district court leaves *it* nothing to do and is therefore final, as in Marin; (c) the remand is final or not depending upon whether it derives from an inadequate factual basis below or an improper determination of law below, as in Martinez or Sambo's (Note: whether the correction of the error of law made by the bankruptcy court and corrected by the district court then results in further adversary proceedings in the bankruptcy court does NOT negate the finality of the

district court's order).

In a more recent decision (7/26/85) the Ninth Circuit further evolved the application of the "finality" doctrine to remands from the district court by discussing the criteria to be applied to remands deriving from *mixed* questions of law and fact [In Re Stanton 766 F. 2d 1283 (9th Cir. 1985)]. Mixed questions of law and fact nevertheless resulting in "finality" for the purposes of appeal are of two types: (a) a central legal issue whose resolution would obviate the need for further fact finding below and; (b) a central legal issue "the resolution of which would materially aid the disposition of the case on remand". Stanton, supra, at 1288, n. 8.

Our case, admittedly involving mixed questions of facts and law, satisfies either of the Stanton criteria. Resolution of the standing of the non

debtor spouse Eva Abdallah *vis a vis* her State Court Receiver obviates the need for a pre-sale factual hearing on the existence of a tenancy by the entirety. Entirety or not, with the Receiver's standing and consent (see Abdallah, supra, at page 77, n.3;A-41 the sale proceeds. Likewise, given a favorable resolution of the law on the tenancy by the entirety issue, the debtor's interest would remain an asset of the estate, death of the debtor or not, the sale of the property would likewise proceed in any event. If it turned out in a *subsequent* action that no tenancy by the entirety existed and that the debtor owned all of the property, the only effect would be that the proceeds of the sale would belong entirely to the bankrupt estate. If on the other hand a tenancy by the entirety existed then the question would be what share of the proceeds would belong to the Receiver. In

no event would the bankruptcy court have jurisdiction to oust the Receiver of one not in bankruptcy and pay the proceeds beyond the order of the Massachusetts Superior Court. Note well -- since the Receiver consents to the sale the normal Section 363 hearing is obviated and the issue is entitlement to what share of the *proceeds*. (As we will see later in this presentation, failure to determine the entirety issue makes calculation of proceed distribution impossible).

Therefore, under Stanton the order of the district court is final. It finally determined the fate of any tenancy by the entirety and destroyed the Order of the Superior Court of Massachusetts [A-75] by re-vesting in a non bankrupt rights taken away from her by the State Court. These are questions of law which are determinative of the substantive legal rights of the parties. These questions are

so bound into the framework of what must next transpire below that the process either cannot logically proceed below without their resolution, or that process would at least be substantially assisted (or obviated) by their resolution.

In addition to the above we note that the First Circuit in its holding that the district court order of remand in our case was not final, relied upon Riggsby. However the Ninth Circuit in its recent Stanton decision (cited above) noted that the Seventh Circuit read the holding of Martinez too broadly in formulating Riggsby. "We conclude that Martinez cannot be read as broadly as Riggsby or Four Seas [In Re Four Seas Center, Ltd. 754 F.2d 1416 (9th Cir. 1985)] might suggest." Stanton at 1287 n. 7. Stanton noted that reliance upon Martinez should be strictly limited to those situations in which the remand was for purely factual

determinations. As we have seen above, the attitude of the Ninth Circuit as expressed in Stanton concerning mixed questions of law and fact is quite different. To the extent that the First Circuit relied upon the Ninth Circuit's holding in Riggsby, that reliance is misplaced in the light of the further explanation offered by the Ninth in Stanton.

The recent decision of the Seventh Circuit itself in Matter of Barker 768 F. 2d 191 (7th Cir. 1985) indicates that the Seventh Circuit now considers the effect which the order sought to be appealed has on the rights of the parties to be an important consideration. Barker at 193-194. Although remands would not "normally" be considered final, three criteria required analysis: (a) whether the remand involved computational or ministerial tasks; (b) whether the remand

would "effect the issues a loosing party might want to raise on appeal following the remand", and; (c) whether the order sought to be appealed "determined and seriously affected the substantive rights of the parties" causing "irreparable harm" to the loosing party if required to wait until the end of the proceeding to have the issues reviewed. Barker, supra, at 33. The criteria were presented not as additive, but as alternative.

In Abdallah, displacement of the duly appointed State Court Receiver through the holding of the District Court [A-26-27] and the abstention of the First Circuit with respect to this issue indeed "determines and seriously affects" the substantive rights of the parties below. It gives Eva Abdallah the standing she needs to generate the reason for the remand at this stage. It vests her with rights to sweep aside her State Court

Receiver and demand proceedings which would not otherwise be required. Your Petitioner, Creditor Richard Drury, the Receiver, and the Trustee in Bankruptcy were all in accord as to the procedure to be followed. Refusing at this stage not to decide whether Eva Abdallah or her State Court Receiver have rights under 11 U.S.C. 363 does not advance the proceedings, it *dooms* them to further inevitable appeal. Whether Eva Abdallah or her State Court Receiver have the very right to appeal below and whose objections and agreements concerning the conduct of the remand trial are to have standing is no peripheral issue. Nothing could be more central than the very identity of the litigants.

Supreme Court Rule 17.1(a) is satisfied by the division in the Circuits set forth above. Two Circuits could not be further apart than the First in Abdallah and the Third in Marin. Likewise the

Seventh in Riggsby and the Eighth in Bestman. The Ninth, through Martinez, Sambo's and Stanton grapples with the reality that the phrases "significant further proceedings" (below on remand) or "nothing remaining for the district court to do" do not adequately represent the spectrum of potential fact situations which arise in the special context of a bankruptcy proceeding.

Although the specific statute which governs the jurisdiction of our appeal is relatively new (28 U.S.C. s. 158 -see Appendix page A-53) it derives from 28 U.S.C. 1293 (see Appendix page A-52) which was enacted as Section 236(a) of the Bankruptcy Reform Act of 1978. Riggsby at 1155 holds that these two sections have the same meaning. See also In Re American Colonial Broadcasting Corp. 758 F.2d 794, 799-800 (1st Cir. 1985). As of this writing your Petitioner is able to locate

decisions of the First, Third, Fifth,Seventh,Eighth, Ninth, Tenth, and Eleventh Circuits construing "finality" in the context of bankruptcy appeals. The division of opinion has if anything, sharpened over time. This Court can with a decision in this case, bring order to an area which promises to otherwise remain both hotly contested and highly confused.

Last, EVEN IF the Order of the District Court is technically "interlocutory" the decision of the First Circuit violates the principals of Cohen v Beneficial Loan Corp. 337 U.S. 541 (1948) and Gillespie v U.S. Steel Corp. 379 U.S. 148 (1964). The District Court decision finally resolved two separable issues with respect to the remand: the standing of the state court receiver and the fate of any tenancy by the entirety. Exclusion of the Receiver below, far from avoiding "piecemeal review", dooms the entire

proceeding to a morass of procedural conflict and inevitable further appeal. Combined with the abstention of the First Circuit with respect to the remand, this amounts to final disposition of:

> "claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated " Cohen, supra, at 546.

See also In Re Exennium, Inc. 715 F. 2d 1401 (9th Cir. 1983).

(B) DOES THE DECISION OF THE FIRST CIRCUIT EFFECTIVELY SWEEP AWAY THE RIGHTS OF A DULY APPOINTED STATE COURT RECEIVER AT A CRITICAL STATE OF THE PROCEEDINGS?

Supreme Court Rule 17.1(a) directs the attention of potential petitioners for a Writ of Certiorari to situations in which a Federal Court of Appeals "has decided a federal question in a way in conflict with a State court of last resort". The practical effect of the decision of the First Circuit in Abdallah is to sweep aside the Order of the Superior Court of Massachusetts [see Appendix pages A-75 to A-77]. This Order was upheld by the Massachusetts Court of Appeals [see Appendix page A-86].

It is Eva Abdallah widow of the Debtor who below contested the Trustee's Motion to Sell under section 363 [the Motion is set forth at A-65 to A-70]. Eva Abdallah is in State Court receivership not in

bankruptcy. Therefore, her rights under the receivership are entirely a matter of STATE LAW. Bankruptcy Judge Lawless did not even address this issue in his Memorandum, [A-1 to A-22], though it was urged by Appellant in the court below. The Receiver for Eva Abdallah George Broomfield, Esq. of Boston does not object to the Trustee's sale--in fact he supports such sale. See Abdallah, supra, at 77 n.3 [A-41, n.3.].

In accordance with the Order of the Middlesex Superior Court Eva Abdallah is restrained from doing anything with any properties she alleges are hers "except to deliver them into the hands of said receiver". See pg. A-75 to A-76, Order, paragraph 2. This is the same clause which appeared in the receivership litigated in the case of Wellman v. North 256 Mass. 496 (1926). There the Massachusetts Supreme Judicial Court stated the definitive role

of State Court receivers as follows:

"The proceeding by receivership is quasi in rem so far as involves a sequestration of assets. THE RECEIVER IS THE REPRESENTATIVE OF THE COURT AND OF ALL PARTIES INTERESTS IN THE LITIGATION". Wellman, supra, 501-502 (emphasis supplied). Upon the appointment of a receiver under State Law the property rights of the person in receivership vest in the RECEIVER. See Wax v. Monks 321 Mass 1 (1957). "Appointment of a receiver divests the defendant of control of the property" 69 Mass.L.Rev. 156,178 (1984) "Massachusetts Prejudgment Security Devices" by Michael Gilleran.

The State Court Receiver of Eva Abdallah having failed to object to the Trustee's Motion, and the Receiver being possessed of Eva Abdallah's rights, the section 363 Motion should have been allowed by the Bankruptcy Court as a

matter of course since no party with standing appeared to contest that Motion.

The District Court held that the receivership did not divest Eva Abdallah of the title she held, if any [A-25 to A-26]. What is at issue however is not bare legal title, but the power to operate and control the property. If the property is reduced to cash it is not suggested that the receiver take the cash for his own use. Rather it held for the creditors of the receivership, AND for the wife of the Debtor to the extent that she can prove an interest in same.

At this point Eva Abdallah's "title", if any, is no better than that of someone under conservatorship. It is a meaningless entry upon the public record, CONTROL of what happens to the property, the right to make decisions with respect to it, has been taken from her for reasons determined to be just by the State Court.

and that matter cannot be re-litigated by her in federal Court See 28 USC 1738.

The CONTROL of property under a state Court receiver is demonstrated through the cases of Perez v. Boston Housing Authority 379 Mass. 703 (1980) and Fauci v. Mulready 337 Mass. 532 (1958). In Perez the receiver took over "the essential functions of the delinquent officials in substance to replace them" Perez at 735.

There is no suggestion in Perez that the receiver divested the Boston Housing Authority of record title. So what? The Authority was stripped of *control* of its own affairs, and the stripping of that control was completely upheld by this State's highest Court as an "equitable power" of the trial court. See Perez at 735 to 738.

Fauci involves a question of whether a receiver may reject an executory contract without a specific order of Court. The

Court held that the receiver was not required to obtain a court order for his every decision and that he would run the business within the parameters of his order. Any claim by the party in receivership that the receiver failed to adopt a valuable contract could be brought by that party in a separate action against the receiver for negligence, but such did not disturb the exercise of dominion and control by the receiver. See Fauci 538-539.

Here the receiver's control, is specific. According to paragraph 2 of the ORDER appointing the receiver, Eva Abdallah is divested of any power to transfer, encumber or do *anything* with respect to "her" alleged property other than to "deliver them into the hands of said receiver". Under Section 363 of the code the receiver would have to protest the Trustee's sale. He did no such thing.

It is the Receiver's judgment which must prevail concerning whether this property is being depleted and is better reduced to cash.

66 Am Jur 2nd Section 201 (page 31) states: "The receiver is the only person entitled to deal with and administer the property in receivership". Furthermore a "receiver is under a duty to convert the assets of the receivership into cash and to make a distribution to creditors within a reasonable time" Mass. Practice Series, vol 31. Nolan, pg. 294. While the usual receiver's sale may be accomplished by application to court, here it is not the Receiver who was seeking to conduct the sale but the Trustee. The Receiver had no evidence that the sale under the auspices of the Federal Bankruptcy Court would not be conducted in a commercially reasonable manner or that an effort would be made to divest his receivership of its cash

equivalent interest. Under 11 U.S.C. 363 any co-owner is only entitled to a cash equivalent interest in any event.

The District Court seeks to supplant its judgment for that of the Receiver. A receiver is not obligated to conduct a business at a loss, and in fact can be held liable for doing so. See generally 20 ALR 3ed 967, Negligence, Receiver's Liability. Here we had income properties. The District Court had no evidence from which to conclude that the Receiver was not entirely justified in consenting to the sale. By setting aside the Receiver's judgment the District Courts seeks to determine the state law rights of two persons NOT in Bankruptcy -- the Receiver and Eva Abdallah.

One who is not in bankruptcy, such as Eva Abdallah, is not entitled to any protection from the Bankruptcy Code. Wedgeworth v. Fibreboad Corp. 706 F.2d

541 (5th Cir. 1983); Williford v. Armstrong World Industries, Inc. 715 F.2d 124 (4th Cir. 1983).

Furthermore the order of the District Court violates 28 USC 1738, and is contrary to the holding of this Court in Kremer v. Chemical Construction Corp. 456 U.S. 461 (1982):

"As one of its first acts, Congress directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own Courts." Act of May 26, 1790, ch 11, 1 Stat 122, 28 USC s1738 (28 USCS s.1738)." Kremer, supra, at 463.

The appointment of a receiver over the property of Eva Abdallah was a final remedy of the Middlesex Superior Court. Eva appealed to the Massachusetts Court of Appeals and the receivership was upheld [A-86]. The Supreme Judicial Court of Massachusetts is technically the Court of final jurisdiction. However, access to that Court is by way of petition for further appellate review (similar to

certiorari) and is a matter of discretion, not right. This is on point with the procedural situation in Kremer where a further appellate Court existed but Plaintiff Kremer did not choose to seek further review. Therefore for the purpose of 28 USC 1738 the federal Court in Kremer was reviewing a final judgment of the highest state Court.

The effect of the holding of the District Court and the abstention by the First Circuit is to send Eva Abdallah back to the Bankruptcy Court in full control over what she claims to be her property. She has already attempted to commence discovery proceedings as a party litigant [see A-88]. She, rather than her duly appointed Receiver, is placed in charge of the course of the litigation - to determine what claims are to be asserted, what defenses made, what compromises made, if any. 28 USC 1738

requires that a federal Court give a state Court judgment the same force and conclusive effect it had in the state Court setting.

No claim was made by Eva Abdallah below that the state Court receivership was constitutionally infirm, as any examination of the ruling of the District Court or the briefs below will show. She argued only that the receiver did not divest her of any "title" she held [A-25 to A-26]. The effect of the District Court judgment and the First Circuit abstention was to oust the Receiver from his position of <u>controlling</u> the property. If control over an asset does not mean the power to direct its fate than the word has no meaning.

By stripping the Receiver of his rights the District Court not only fails to give full faith and credit to the Order of the State Court, but has by effect,

if not in explicit wording, enjoined that Court in violation of 28 USC 2283 (Anti-Injunction Act).

"Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their Court, the exceptions should not be enlarged by loose statutory construction. Proceedings in state Courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers 398 U.S. 281, 287 (1970).

Given that the Receiver, your Petitioner (the majority Creditor of the bankrupt), other Creditors, and the Trustee agreed on a process of orderly liquidation, stopping that process by replacing the Receiver's participation with Eva Abdallah's amounts to a de facto injunction against the Receivership. By the law of Massachusetts he has full control over the property of Eva Abdallah. By the combined decision of the District

Court and abstention of the First Circuit, he is rendered a sterile observer of the important proceedings which must follow below.

(C) The abstention of the First Circuit from deciding whether the interest of the bankrupt estate in a tenancy by the entirety after the death of the debtor sanctions a departure by the District Court and Bankruptcy Court from the usual course of judicial proceedings in an important area of real property law.

The decisions of the District and Bankruptcy Courts hold that the non debtor spouse inherits a tenancy by the entirety free of the bankrupt estate after the death of the debtor [see A-13-14; A-28-29]. The District Court remanded for a hearing to determine the true title holder. However, the abstention of the First Circuit [A-38] leaves as the law of this case that upon proof of a tenancy by the entirety the non debtor spouse is vested with the property [otherwise we are asking the Bankruptcy Court to overturn the District Court]. This result is an

anomaly deriving from the "two levels" of appellate courts in a bankruptcy setting, and places your Petitioner in an impossible procedural quagmire . The "remand" will not consider the survivorship of the entirety interest in the bankrupt estate. Thus, how will an appeal from whatever that remand determines bring the entirety issue back up for decision ? Your Petitioner, by the abstention of the First Circuit is thus effectively denied a forum for appeal of this critical issue.

Furthermore, the abstention ignores the clear intent of Congress to eliminate the "state by state" treatment of marital property interests which plagued the Bankruptcy Act of 1898.

1. Former 11 U.S.C. Section 26 (a/k/a Bankruptcy Act, section 8) dealt with the eventuality of the debtor's death under pre-1978 Act law. The legislative history

of the new Bankruptcy Code states:

> "Bankruptcy Act Section 8 has been deleted as unnecessary. Once the estate is created, no interests in property of the estate remain in the debtor. *Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's probate estate. The bankruptcy proceeding will continue in rem with respect to the property of the estate*, and the discharge will apply in personam to relieve the debtor, and thus his probate representative of liability for dischargeable debts." Bankruptcy Law Revision, Report of the Committee of the Judiciary, 95th Congress, 1st Session [To accompany H.R.8200] House Report 95-595 (hereinafter H.R. Rep. 95-595) at 368 (emp. supp.).

The legislative history of the new Bankruptcy Code section 363 was comprehensively discussed by the New York Bankruptcy Court when considering the liquidation of a tenancy by the entirety in a cooperative apartment.

> "Section 363(h) of Title 11 is new to bankruptcy law...The legislative history of the Code establishes that Section 363(h) of

the code was inserted to permit the sale of marital property, like that here involved. One of the aspects of the pre-Code law which was criticized by the Commission on the Bankruptcy Laws of the United States was the difficulty experienced in handling jointly owned marital property. To deal with the problem, the statute proposed by the Commission which evolved into the present Code defined "property of the estate" broadly so as to embrace an estate by the entirety. H.R. Doc. No. 93-137, 93d Cong. 1st Sess (Part I), pg. 195, (part II), pg. 147. The proposed statute also contained an earlier version of Section 363(h) described as follows by the Commission:

'The ability to dispose of the property [the right to be an undivided interest] is dealt with by a separate provision in the proposed Act allowing the trustee of either spouse to sell both the debtor's and his spouse's interest in nonexempt property, if owned by the entirety, as tenants in common, or joint tenants. The spouse who is not a debtor in a case under the proposed Act is sufficiently protected by the requirement that the net proceeds of the sale attributable to the spouse's interest, after deducting all direct expenses of the sale, exclusive of any compensation for the trustee, be disbursed to such spouse.' H.R.Doc. No. 93-137, 93d Cong., 1st Sess. (Part I), p. 196 (1973).

THUS, THE CODE WAS VERY

> *DELIBERATELY DRAFTED TO PERMIT SALE OF THE NONFILING SPOUSE'S INTEREST BY THE TRUSTEE SO AS TO REALIZE THE MAXIMUM FROM THE FILING SPOUSE'S PROPERTY."* (emphasis supplied) In Re Levenhar 24 BR 331, 332 (1982).

Furthermore we have the precise wording of Section 363(h) [for full text of Section 363 see Page A-47 to A-50]. What interests of the debtor and co-owner(s) may be sold?

> "both the estate's interest...and the interest of any co-owner in property IN WHICH THE DEBTOR HAD IMMEDIATELY BEFORE THE COMMENCEMENT OF THE CASE, an undivided interest as a...tenant by the entirety". 11 USC 363(h) (emphasis supplied).

The time of commencement of the case is the operative date for the determination of the debtor's interest. That is the plain language of the statute. The intent of the statute as set forth above in the citations in Levenhar is to "*very deliberately*" insure the maximum value to the bankrupt estate. The legislative history declares that if the debtor dies the proceeding is to "continue

in rem with respect to the property of the estate" H.R. Rep 95-595 at 368. ONLY exempted, or after acquired and excluded interests are to pass to state probate administration H.R.Rep. 95-595 at 368.

In addition Bankruptcy Rule 1016 promulgated by this Court pursuant to authority granted by 28 USC s.2075 states:

"Death or insanity of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered, and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred." [for full text of Rule see page A-56 hereto].

Bankruptcy Rule 1016 means that the date of death is NOT relevant in the current context. Though Rules are not a source of substantive law, there is a "strong presumption" that Bankruptcy Rules issued by the Supreme Court pursuant to 28 USC s. 2075 ARE an accurate reflection of the substantive statutes with which they interface. Matter of Mobile Steel Co. 563 F.2d 692, 699 (1977).

Rule 1016 is cited by the Pennsylvania Bankruptcy Court in In Re Friedman, 34 B.R. 275 (Bkrtcy 1984) in allowing a widow to exercise her husband's homestead exemption in a tenancy by the entirety. The creditor in that case asserted the position advanced by the Bankruptcy and District Courts in our case - that upon the death of the husband, the wife took the property free of the bankruptcy proceeding. Not so said the Court in Friedman 11 USC Section 522(b)(2)(B) there before the Court refers to:

"(B) Any interest in property which the debtor had immediately before the commencement of the case,..." (emphasis supplied by the Court).

This is language identical to that in section 363(h) prior to the enactment of P.L. 98-353, 98th Congress. the Friedman Court held that such language required that the subject rights vest at the time of filing.

The new Bankruptcy Code is intended as

a comprehensive revision of prior law and undertakes to extensively revise the definition of the debtor's estate. Tenancies by the entirety which had been excluded are now included. Sale of the interest of a co-tenant, clearly prohibited by applicable property law in Massachusetts and most other states having tenancies by the entirety are now allowed. The rights of a co-owner in the proceeds of the sale, the protections to be afforded, a right of first refusal at the highest bid--all these items are regulated and defined by the new 11 USC section 363. There has been no "Congressional silence" in this area. Congress has been both comprehensive and with clear purpose.

"The law determines what is property of the estate. Current law is a complicated melange of references to state law, and does little to further the bankruptcy policy of distribution of the debtor's property to his creditor in satisfaction of his debts" H.R.Rep.No. 95-595, page 175.

S. 363 of the new code must be read as part of a comprehensive scheme for

defining and dealing with the limits of a bankrupt's estate and any of his non bankrupt co-owners. Any state law principles, to the extent that they conflict with this Congressional purpose:

> "can have no authoritative effect to the extent that they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause" Perez v. Campbell 402 US 637, 652 (1971).

2. The filing of a bankruptcy petition severs any joint interest in property held by the debtor.

Not long after the enactment of the Bankruptcy Reform Act of 1978 the House of Representatives proposed additional legislation entitled "An Act To Correct Technical Errors, Clarify and Make Minor Substantive Changes to Public Law 95-598". House Report 96-1195 (96th Congress, 2nd Session) was submitted with the proposed bill (S.658). Relevant Sections of H.R. 96-1195 and S.658 are set forth in Appendix pgs A-57 through A-64.

Section 26(d) of S.658 proposed to amend 11 USC Section 363(h) as it had been

enacted in Public Law 95-598 thusly:

"SEC 26(d). Section 363(h) of title 11 of the United States Code is amended by striking out "immediately before" and inserting "at the time of" in lieu thereof."

The purpose of the proposed amendment is clearly stated in H.R. 96-1195, on page

"Subsection (d). This amendment makes it clear that when the Trustee sells property in which the estate holds a joint interest, THAT JOINT INTEREST SHALL HAVE BEEN SEVERED when the property became property of the estate and the other (non-estate) joint-owner shall receive from the sale an aliquot portion of the proceeds, not an actuarially determined amount". (emp. sup) 96-1195,pg 11 [A-61]:

Declarations of intent by bill reporting Committees command great weight:

"This statement by the Committee which reported the general Allotment Act of 1887, made within five years of its passage, it virtually conclusive as to the significanc of the Act. Sioux Tribe v. U.S. 316 U.S. 317, 329-330 (1941)"

"..while the views of subsequent Congress cannot override the unmistakable intent of the enacting one...[citations] ...such views are entitled to significant weight... [citation]...., and particularly so when the precise intent of the enacting Congress is obscure" Seatrain Shipbuilding Corp. v. Shell Oil Co. 444 U.S. 572 (1979). Note especially F.H.A. v. The Darlington, Inc. 358 US 84 (1958).

The proposed clarification of the meaning of 11 USC Section 363(h) as previously explained in H.R. 96-1195 was enacted as Section 442(e) of P.L. 98-353 and entitled "Bankruptcy Amendments and Federal Judgeship Act of 1984". The enactment was "word for word" with only the ordering of the last phrase changed (i.e. P.L. 98-353, Sec. 442(e) reads at its end "inserting in lieu thereof 'at the time of'" instead of "'at the time of' in lieu thereof"). The legislative history on P.L. 98-353 makes no further comment on its Section 442(e). A cursory examination of many sections of P.L. 98-353 will reveal that they were taken verbatim from s.658 (with equal reverse ordering of the non substantive phrasing "in lieu thereof").

It is clear from H.R. 96-1195 that a substantive change in Section 363(h) was not intended by S.658 Section 26(d), but only a clarification of existing law.

The nature of the wording change serves to focus the attention upon the time of filing as the important instant for clevage and "freezing" of interests. The difference between the prior wording of the interests "immediately before" the filing and the clarified wording of "at the time of" modifies the entire clause containing the list of applicable "joint interests". No differentiation is made between "joint tenancies" or entireties property.

The concept of "severance" is further supported by the requirement that the proceeds be determined in "aliquot portions" and NOT in actuarially determined amounts. This clear legislative history is in sharp contrast to Judge Skinner's holding that the Code requires calculations of "survivorship interests" that "may fluctuate with alteration over time of the actuarial life

expectancies of the parties" [Skinner, D.J. pg. A-30]. Because Judge Skinner mistakenly read 11 USC Section 363(h) as requiring some sort of dynamic evaluation of the interests of the parties throughout the Bankruptcy proceeding, he concluded that it was necessary to value the non debtor spouse's interest on an actuarial basis on the date of sale.

Under Judge Skinner's approach the *relative* interest of the co-owners would continue to fluctuate **throughout the proceeding.** The date of filing is fixed and known to all interests and except for involuntary proceedings, determined by the debtor. The date of sale however is influenced by many things: the size of the estate, if a hearing is to be had, the status of the court calendar, the work load of the trustee, the duration required for any appeals - all certainly items within the common knowledge of a Congress

which had studied the operation of the Bankruptcy Court for years prior to enacting the 1978 Code. Other dates for fixing relative valuation, such as the date of filing of the Section 363 Motion to Sell, are subject to equal infirmities.

The inherent reasonableness of reading Section 363(h) in the light of the Congressional intent as expressed in H.R. 96-1195 is further demonstrated by performing a few rudimentary mathematical calculations utilizing standard actuarial tables. For example a 60 year old married male holding a tenancy by the entirety interest in a property with an equity of $100,000 would have an actuarially determined interest valued at $55,052. If two years elapsed from the date of filing to the date of sale, and the equity increased to a total of $120,000 over that time, the non debtor spouse would receive 61% of the gain and the bankrupt

estate only 39% of the gain - presuming the date of sale is utilized for allocating the interests. The longer the duration from the filing to the sale, the more the loss of gain to the bankrupt estate. Furthermore, in the event of declining values, more loss is allocated to the bankrupt estate, and the percentage of that loss allocated to the bankrupt estate again increases as a function of the time from the date of filing to the date of sale.

Given precisely stable values over time, the interest of the bankrupt estate still declines over time. This is true whether the debtor is a man or a woman. It is intrinsic in the nature of the actuary table. For our calculations we utilized standard I.R.S. tables as set forth in I.R.S. Regulations 25.2512-9(f).

"Aliquot" is defined in West's "Words and Phrases" as follows: "The word

'aliquot' is generally used in judicial opinions to signify a particular fraction of the whole", citing Skehill v. Abbott 184 Mass 145 (1903). Another Massachusetts case giving some light to the instant situation is McGowan v. McGowan which considered whether payment of a part of the purchase money of real estate would give rise of a resulting trust. There an "aliquot part" was defined:

"...a specific share, as a tenancy in common or joint tenancy of one half, one quarter, or other particular fraction of the whole" McGowan v. McGowan 14 Grey 119,121 (1859). Webster's 3ed Edition New International Dictionary, Unabridged (G. & C. Merriam publisher, 1968) defines "Aliquot" to mean: "(1) contained an exact number of times in something else - used of a divisor or part; (2) fractional".

"Severance" as of the date of filing avoids time based prejudice to the interest of the bankrupt estate.

Aliquot shares are to be set upon filing. Then, if there is gain, BOTH the bankrupt estate and the non-debtor joint owner

would share according to their fixed percentage interest. Likewise with loss. If we are to attribute to the operation of Section 363 the result that the bankrupt estate is prejudiced in direct proportion to the time needed for administration, for hearings, as a result of recalcitrant debtors or collusive co-owners filing appeals or engaging in dilaroty activity of every nature, must not such result derive from the plain wording of the statute? To hold otherwise is to conclude that the careful balancing of the interests of debtors and creditors which the Code sought to achieve was nevertheless thrown to the winds when the interest of co-owners come into play. The co-owners shall always reap the majority of the harvest in times of increasing value, but always be more insulated than the estates in circumstances of loss.

An "aliquot" interest, since it is

a fractional (i.e. relative) interest does not fluctuate over time.

Thus, the legislative history of the Bankruptcy Code of 1978, the plain wording of section 363 , and the Bankruptcy Rules require the conclusion that the death of the debtor has no effect upon the liquidation of a tenancy by the entirety.

The issues before the Bankruptcy Court pursuant to the remand will be a determination of what parties hold title to the property. Upon proof of a tenancy by the entirety interest under the law of the case the property becomes vested in Eva Abdallah. This creates a result at clear variance with an established legislative purpose in an important area of real property law.

CONCLUSION: The petition for writ of certiorari should be granted.

Respectfully submitted: S.James Boumil,Esq.

BEST AVAILABLE COPY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re	)	
	)	Chapter 7
GEORGE ABDALLAH,	)	
	)	Case No.
Debtor	)	80-01759-L
	)	

James M. Langan, Esq., Langan, Dempsey & Brodigan, Boston, Mass., for Eva Abdallah, (non-debtor surviving spouse of the above-named Debtor).

S. James Boumil, Esq. nephew of the Debtor, Lowell, Mass., for Richard Drury, Esq., (administrator of the Estate of Mary T. Abdallah, mother of the Debtor).

Jordan L. Shapiro, Esq., Shapiro & Shapiro, Malden, Mass., for George Abdallah, Jr., (son of the Debtor).

Allen H. Roffman, Esq., Chelsea, Mass., (Chapter 7 Trustee).

Charles P. Bennett, Esq. Riemer & Braunstein, Boston, Mass., (special counsel to the Trustee).

LAWLESS, CHIEF JUDGE

MEMORANDUM AND ORDER RE
MOTION TO COMPEL SALE OF ASSETS

The issue before the Court is whether

the trustee can sell, pursuant to 11 U.S.C. S363(h), property that was held by the debtor and his non-debtor spouse as tenants by the entirety on the day of the bankruptcy filing where the debtor died prior to the filing and allowance of the S363(h) action.

This internecine feud of the Abdallah family came into this Court when George Abdallah (the "Debtor") filed a Chapter 7 petition on October 8, 1980. Most, but not all, of the family members involved and their relationship with the Debtor are set forth above and will not be repeated. Nor will the various allegations by and between the Abdallahs be addressed other than to state that the battle began in 1965 when the Debtor assumed the duties as executor under his mother's will and allegedly began to misappropriate assets from his mother's estate. In the decade and a half preceding the filing of this

bankruptcy proceeding, various family members/creditors of the Debtor had commenced actions in the Probate and Family Court, the Middlesex Superior Court, and the District Court of Lowell, and obtained in those actions various attachments, judgments and levies against various parcels of real estate which they claimed were owned by the Debtor and/or fraudulently conveyed by the Debtor to various third parties.

On July 28, 1981, approximately nine months after the filing of the Debtor's Chapter 7 petition and while the bankruptcy case was still pending, the Debtor died. On or about July 30, 1982, the trustee in bankruptcy brought an Adversarial Motion for Leave to Sell at public auction various parcels of real estate either owned by the Debtor and his non-debtor spouse as tenants by the entirety or by third persons who had

purchased the property from them prior to the bankruptcy. After several continuances, a hearing was held on January 13, 1983 on the Trustee's motion and the seven written objections thereto, whereupon the Court denied the Trustee's motion without prejudice as being an improper vehicle to effectuate a disposition of property standing in the name of third parties. Subsequently, on June 13, 1983 Richard Drury, Esq., administrator of the estate of Mary T. Abdallah (the Debtor's mother), by his attorney S. James Boumil, Esq. (the Debtor's nephew), brought a motion to compel the sale of only those parcels of real estate that were held by the Debtor and his non-debtor spouse as tenants by the entirety at the time of the filing of the bankruptcy petition (the "creditor's motion"). The property is alleged to consist of three rental properties and the personal residence of the late Debtor and

his wife, including twenty-five acres of land.

After hearing the creditor's motion, the objections thereto, and having afforded all interested parties an opportunity to submit briefs on the issue (the last of which was filed on January 10, 1984), I find as follows:

A debtor's undivided interest in property held as tenants by the entirety is included in his estate in bankruptcy as are all of his legal and equitable interests in property, however held. 11 U.S.C. S541(a). See In re Ford, 3 B.R. 559 (Bankr. Md. 1980), aff'd per curiam sub nom, 638 F.2d 14 (4th Cir. 1981); (D.Vt. 1982). The undivided interest passes to the estate without any severance of the unities of time, title, identity of interest and possesion, intact and unaltered, and may thereafter be

exempted from the estate. See In re Ford, supra, at 571; In re Panholzer, 11 B.C.D. 447 (Bankr. D. Md. 1984). This is characteristic of entireties property and not of property held as joint tenants with a right of survivorship, which is severed by the filing of a bankruptcy petition. See In re Panholzer, supra, at 449.

State law defines the nature and extent of a debtor's and, therefore, the estate's interest in property. "Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." Butner v. U.S., 440 U.S. 48, 54-55 (1979). Accordingly, the nature of the Debtor's interest in the property held as tenants by the entirety is determined by the law of Massachusetts.

See In re Ignasink, 22 B.R. 828, 829 (Bankr. E.D. Mich. 1982).

The husband's interest in tenancy by the entirety property, under the classic form of tenancy by the entirety prevailing in Massachusetts, consists of his exclusive right of control, possession, and income during their joint lives, See Raptes v. Pappas, 259 Mass. 37 (1927), together with an "indestructible" right to the remainder if he survived his wife; and the husband's interest could be reached by his creditors. See West v. First Agricultural Bank, 382 Mass. 534, 536 (1981). The wife's interest consisted only of a corresponding right of survivorship, but this interest was neither alienable nor subject to levy by her creditors or her husband's. Id. The survivorship right in either spouse is indestructible in the sense that partition is not available to a tenant by the entirety. See M.G.L. c.241 S1. However,

the husband could dispose alone of his survivorship right, while the wife could not so dispose of her survivorship. See Licker v. Gluskin, 265 Mass. 403, 404-407 (1929); Raptes v. Pappas, 259 Mass. 37, 38-39 (1927). Both spouses, acting together, could convey the estate, destroying both survivorships. See Bernatavicius v. Bernatavicius, 259 Mass. 486, 487 (1927). Unless the parties intended or agreed otherwise, upon divorce the tenancy dissolved and becomes a tenancy in common. Id. at 490.

In the event that the wife survived her husband, upon his death she took no new title by survivorship, but held under the deed by virtue of which she was originally seized by the whole. Palmer v. Treasurer & Receiver General, 222 Mass. 263, 265 (1915). The right of survivorship is an attribute of the ownership by each spouse of the entire

estate from the time it was conveyed to them; it is not a contingent future interest in the surviving spouse, superadded to a joint life estate. C. Moynihan, Introduction to the Law of Real Property, at 230 (1962). In Palmer, supra, at 265, the court held that on the death of either the husband or the wife who held real estate as tenants by the entirety, no beneficial interest accrued to the other by survivorship so as to create succession, and so no part of the estate was subject to tax. "Upon the testator's (the husband's) death the estate was simply freed from participation by him. The complete title of a surviving tenant by the entirety is not acquired by intestate succession, but by reason of the nature of the estate." Id. While this tax ruling has subsequently been overturned by statute, the basis of the court's decision - that the survivor

takes by virtue of the title and not by the death of the spouse - has as its basis the common law concept that tenants by the entirety are seized of the whole and not of a share, per tout et non per my.

Judge Moynihan has said:

> If you find this concept difficult to grasp, you are not alone. In his dissenting opinion in King v. Greene, 30 N.J. 395, 413, 153 A.2d 49, 60 (1959) Chief Justice Weintraub has this to say: "The estate by the entirety is a remnant of other times. It rests upon the fiction of a oneness of husband and wife. Neither owns a separate distinct interest in the fee; rather each and both as an entity own the entire interest. Neither takes anything by survivorship; there is nothing to pass because the survivor always had the entirety. To me the conception is quite incomprehensible."

C. Moynihan, Introduction to the Law of Real Property, 229, at note 1 (1962). Comprehensible or not, this is the law in Massachusetts under which the estate's interest in this property must be determined.

In Raptes v. Pappas, 259 Mass. 37

(1927), the creditor levied on the husband's interest in property held as tenants by the entirety and it was sold at sheriff's sale. The creditor purchased the interest at the sale and proceeded to bring a writ of entry, alleging that she was entitled to what amounted to an estate for the joint lives of the husband and wife with a contingent remainder in fee. The Massachusetts Supreme Judicial Court affirmed judgment for the creditor, saying:

> A tenancy by the entirety may be taken on an execution against the husband, and the purchaser at the sale on execution may maintain a writ of entry against him for possession and title. Such possession and title will fail in the event of the wife surviving him. The purchaser may maintain the writ against the wife for possession but not for her title; if she survives her husband she will have an absolute title with the right to possession. If the husband survives the wife the demandant's title will be absolute.

Id. at 38-39. Thus, the trustee's status as a lien creditor does not prevent the

extinguishment of the estate's interest in the tenancy by the entirety property upon the death of the debtor spouse.

Congress has superseded the otherwise indestructible right of survivorship of the non-debtor wife under Massachusetts law by the enactment of 11 U.S.C. s363(h), which provides as follows:

> Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if-
>
> (1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
>
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

> (4) such property is not used in the production, transmission or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light or power. (emphasis added).

The creditor points to the above-emphasized language, as well as S541 (the debtor's estate consists of all of the debtor's legal and equitable interests in property "as of the commencement of the case"), for the proposition that the post-filing death of the debtor does not affect property of the estate because the estate's interest is determined on the day of the bankruptcy filing. The creditor apparently urges that under S363(h) the Court should disregard the Debtor's death, place an actuarial value on the interest of the Debtor on the day of the filing of the petition, order a forced sale of the property, and distribute the proceeds accordingly.

The Court's research has revealed

one case that arguably supports the creditor's position. In In re Bachman, 21 B.R. 849 (Bank. W.D. Pa 1982), the court held that a debtor's death did not divest the bankruptcy estate of the debtor's undivided interest in property held as tenants by the entirety with his non-debtor spouse. Bachman, however, seems to be distinguishable because there the Chapter 11 debtor died after an oral order of confirmation was entered on a plan of reorganization that provided for the sale of the tenancy by the entirety property to a third party. The order of confirmation might well be equated with an order confirming a sale under 11 U.S.C. S363(h), which does extinguish the non-debtor's survivorship right, irrespective of the subsequent death of the debtor spouse.

In any event, I decline to follow Bachman. In that case, the debtor's

post-filing death was characterized as affecting a post-petition transfer of the husband's interest in the entirety property to the non-debtor wife. While this analysis may follow under Pennsylvania's view of a tenancy by the entirety, it is not in accord with the law of Massachusetts. As I have explained above, under Massachusetts law the death of one spouse does not effectuate a transfer of tenancy by the entirety property to the surviving spouse; the surviving spouse was already seized of the whole by virtue of the deed. See Palmer v. Treasurer & Receiver General, supra, at 265. In Hayes v. Shaefer, 399 F. 2d 300 (6th Cir. 1968), the trustee obtained, under Kentucky law, the bankrupt's contingent right of survivorship. When the bankrupt's husband died eight months after the petition was filed, the entire fee passed to the trustee as holder of the

right of survivorship. [4/]

The Court said:

> The death of a co-tenant does not increase the interest of the other tenant since from the time the tenancy was created both tenants were seized of the whole.... the surviving tenant of a tenancy by the entirety does not inherit from the co-tenant, but rather the surviving spouse takes by virtue of the deed....
>
> It was indeed fortuitous that the bankrupt survived her husband. Had she (the bankrupt) died first the trustee in bankruptcy would have had no interest in the land to sell and would have realized nothing for the bankrupt's estate.

Id. at 302 (citations omitted) (emphasis added). While the above-emphasized language is apparently dicta, the similarities between the relevant incidents of Kentucky and Massachusetts tenancy the entirety law warrant the conclusion that under the Bankruptcy Act the post-filing death of a bankrupt divested the bankruptcy estate of any interest in the tenancy by the entirety property.

In the creditor's memoranda in support of his motion, he advances the argument that Congress has altered this result by the enactment of the Bankruptcy code. I disagree because the mere filing of a bankruptcy petition does not sever or otherwise alter the ownership incidents of a non-debtor tenant by the entirety. See In re Ford, supra, at 571; In re Panholze, 11 B.C.D. 447 (Bankr. D. Md. 1984). Section 363(h) modifies the co-tenant's rights under state law by providing a method for realizing the value of the debtor's interest in property held as tenants by the entirety with the non-debtor spouse. The House Judiciary Committee, addressing S363(h), said:

> The bill (HR 8200) also changes the rules with respect to marital interests in property. Interests in the nature of dower and curtesy will not prevent the property involved from becoming property of the estate, nor will it prevent sale of the property by the trustee. With respect to other co-ownership interest, such as tenancies by the

> entirety, joint tenancies, and tenancies in common, the bill does not invalidate the rights, but provides a method by which the estate may realize on the value of the debtor's interest in the property while protecting the other rights. The trustee is permitted to realize on the value of the property by being permitted to sell it without obtaining the consent or a waiver of rights by the spouse of the debtor or the co-owner, as may be required for a complete sale under applicable State law. The other interest is protected under H.R. 8200 by giving the spouse a right of first refusal at a sale of the property, and by requiring the trustee to pay over to the spouse the value of the spouse's interest in the property if the trustee sells the property to someone other than the spouse. Similar rules will govern certain sales of community property if both spouses are not proceeding under title 11. H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 177 (1978).

Congress intended to provide a method for cashing out the debtor's interest for the benefit of his or her creditors; however, this conversion can only take place after satisfaction of the Congressionally enacted protections afforded the non-debtor spouse. Since the

Debtor in the case at bar died prior to the initiation and satisfaction of a S363(h) action, the interests of the non-debtor spouse remain as they exist under applicable state law.

The creditor's final argument is that a ruling against his motion will prompt a rush to the bankruptcy courts by terminally-ill debtors. This argument is without merit because the result herein - the passage of full and complete title to the non-debtor spouse unimpeded by the debtor spouse's creditors - occurs outside of bankruptcy. If Congress intended a different result, then it would not have enacted S363(h) in its present form.

Accordingly, based upon the foregoing, the creditor's motion is DENIED.

It is so Ordered.

Dated at Boston, in said District,

this 12 day of April, 1984.

THOMAS W. LAWLESS

CHIEF U.S. BANKRUPTCY JUDGE

ENDNOTES

1/ In the case at bar, the Debtor chose his federal exemption and therefore his exemption of the tenancy by the entirety property is limited to $7,500. However, even if the Debtor chose his exemptions under state law, his interest in tenancy by the entirety property in Massachusetts is not exempt from process (11 U.S.C. S522(b)(2)(B)). See infra and Lavien & Mencher, The Eclipse of Massachusetts Tenancy by the Entirety, 67 Mass. L. Rev. 170 (1982).

2/ Under a revised statute, Mass. Gen. Laws. ch. 209 S1, which became effective February 11, 1980, where property is held as tenants by the entirety, both the husband and wife are entitled equally to the rents and profits from and the use, control and possession of, the property in question. Creditors of a debtor spouse may not reach the property interest of the debtor spouse if the property is the principal residence of the nondebtor spouse. However, the property is available to satisfy debts incurred by either spouse or a member of their family on account of "necessaries".

It has been recently held, however, that the provisions of the amended statute, Mass. Gen. Laws ch. 209 S1, do not apply to tenancies by the entirety created before February 11, 1980, even if the creditor seizes the principal home of the non-debtor spouse after the effective date of the statute. Turner v. Greenway, ____Mass. ____, 495 N.E. 2d 821 (1984). Accordingly, the prior law governs in the instant case.

3/ The Court expresses no opinion on this issue.

4/ As noted in Craig, Analysis of Estates by the Entirety in Bankruptcy, 48 Amer.Bank. L.HJ. 225, 266-267 (1974), the bankrupt-wife's request for only one-half the fee was an illogical position, because on death, the spouse should get all or nothing. See Also In re Flynn, 1F. 2d 556 (W.D. Pa. (1924)

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MASSACHUSETTS

In re	)	Chapter 7
	)	
GEORGE ABDALLAH,	)	Case no.
	)	80-01759-L
Debtor	)	
	)	

O R D E R

Based upon the foregoing Memorandum, the creditor's motion to compel sale of assets is hereby DENIED.

Dated at Boston in said District, this 12th day of April, 1984.

THOMAS W. LAWLESS
CHIEF U.S. BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

RICHARD DRURY, ADM., et al, Appellants,	*	
	*	BANKRUPTCY APPEAL
v.	*	CIVIL ACTION
	*	NO. 84-2458-S
GEORGE ABDALLAH, Debtor	*	

MEMORANDUM AND ORDER

December 27, 1984

SKINNER, D.J.

This appeal is from the order of a bankruptcy judge denying the trustee's application to sell real property held by the debtor under a tenancy by the entirety at the time the petition was filed ("the property"). Prior to the application to sell the property, the debtor died, leaving his wife, not a debtor, as the surviving tenant. The appellants are the trustee and the administrator of the estate of the debtor's mother. The estate of the debtor's mother is the principal

creditor of the bankrupt estate, a probate court having found the debtor liable as executor for misapplication of funds. The administrator of the mother's estate claims that the debtor transferred the property into tenancy of the entirety in fraud of creditors, and that the surviving spouse is a straw. The administrator has caused a real estate attachment to be made of the property as property of the debtor individually. Both the trustee and the administrator appeal the bankruptcy judge's ruling of law that full title has devolved into the surviving wife and the property is not part of the bankrupt estate.

The appellee is the debtor's wife, the surviving tenant. The appellants challenge her right to contest the appeal because her affairs are subject to a state court receivership. The receivership does not disturb the title to real estate,

however, and I rule that she is entitled to contest this appeal. Bell v. American Protective League, 163 Mass. 558, 40 N.E. 857 (1895); Wellman v. North, 256 Mass. 496, 152 N.E. 886 (1926); see Nolan, Mass. Practice, Equitable Remedies, SS163, 165.

The appellee challenges jurisdiction of the court to entertain the appeal. I am satisfied that the bankruptcy judge's order conclusively determines a separable dispute over the availability of the property to satisfy claims against the state. In Re Saco Local Development Corp., 711 F.2d 441 (1st Cir. 1983). Whether it is here of right or as matter of discretion it is clearly ripe for review. There is no need to agonize over whether the appeal should have been by notice or by motion for leave to appeal. I treat the notice as a motion and allow it.

The substantive issue is whether the trustee in bankruptcy may sell property owned by the debtor as a tenant by the entirety, when the debtor dies before the sale and the spouse survives.

Tenancy by the entirety only exists where the tenants are husband and wife. It is similar to joint tenancy, except that it is substantially inseverable during the continuation of the marriage except by consent of both parties. The common law rules granting to the husband, the debtor here, the exclusive right to control possession and income of the property, has been modified by a 1979 amendment to M.G.L. c. 209, Sl. The law remains, however, that the wife's right to survivorship in the whole estate is not destroyed by the conveyance or attachment of the husband's interest. West v. First Agricultural Bank, 382 Mass. 534, 536, 419 N.E. 2d 262 (1981); Licker v. Gluskin, 265

Mass. 403, 407, 164 N.E. 613 (1929); Bernativicius v. Bernativicius, 259 Mass. 486, 487, 156 N.E. 685 (1927). See generally, Friedman v. Harold, 638 F.2d 262 (1st Cir. 1981); Crocker's Notes on the Common Forms, 7th Ed. (Swaim), Little Brown and Company, 1955.

The Bankruptcy judge correctly rules that the debtor's (Husband's) interest became part of the bankrupt estate upon the filing of the petition, but upon the debtor's death that interest expired, evaporated, dissolved, leaving the whole title to the property in the surviving wife free from the claim of creditors of the estate. The bankruptcy judge rules that this result was mandated by the controlling law of Massachusetts governing title to real estate.

In my opinion, the bankruptcy judge arrived at the correct result, but without the proper analysis and application of the

preemptive federal Bankruptcy Code, particularly 11 U.S.C. S363(h) and (g).

It is clear that the debtor's interest in tenancy by the entirety, and only the debtor's interest, becomes property of the bankrupt estate. In Re Ford, 3 B.R. 599, 570-1 (Bkrtcy.D.Md. 1980) aff'd per curiam, sub nom, Greenblatt v. Ford, 638 F.2d 14 (4th Cir. 1981). Under S363(h) the Trustee may sell both the debtor's interest and the interest of the other tenant, subject to certain conditions, one of which appears in subsection (3):

> (3) The benefit to the estate of a sale of such property free of the interest of co-owners outweighs the detriment, if any, to such co-owners.

Section 363(j) provides that the trustee shall distribute the net proceeds of the sale to the estate and to the debtor's spouse (in the case of a tenancy by the entirety) "according to the interest of such spouse..., and of the estate." The key to this case is the time

at which the interest of such spouse should be calculated.

This section appears to me to reflect congressional intent to preserve the interest of the debtor's non-debtor spouse to the extent possible without freezing the property. The interest of a wife in a tenancy by the entirety since the amendment of M.G.L. c. 209 S1 includes a right to share in the control, management and possession of the property. She also acquires full title upon the death of the husband if she survives him. The value of both of these interests may change over time, particularly in a period of rapid appreciation in the value of real estate. Furthermore, the value of her right of survivorship also may fluctuate with alteration over time of the actuarial life expectancies of the parties. The spouse's interest is accordingly not fully protected unless it is valued in the event

of sale as of the date of sale.

When, as in this case, the husband dies prior to the sale, the value of the wife's interest is equivalent to the value of the whole property. The benefit to the estate from the sale is zero, and consequently cannot outweigh the detriment to the interest of the spouse, as required by S363(h)(3). One of the conditions precedent for the sale of the spouse's interest accordingly has not been met, and the sale is not authorized under the statute. The result is the same as that reached by the bankruptcy judge, but by application of clearly paramount and preemptive federal law rather than state law.

Cases suggesting a contrary result are In Re Lambert, 34 B.R. 41 (Bkrtcy.D.Col. 1983) and In Re Bachman, 21 B.R. 849 (Bkrtcy. W.D.Pa., 1982). In Re Lambert is distinguishable in that it dealt with a

joint tenancy under Colorado law rather than with a tenancy by the entirety. Under Colorado law, a joint tenancy is severed by a creditor's attachment of the interest of one of the joint tenants, and the court held, essentially, that the filing of a petition in bankruptcy had the same effect. The court specifically distinguishes tenancies by the entirety. 34 B.R. at 43. In Re Bachman, supra, dealt with a reorganization petition under Chapter 11 of the code. The proposed sale of property held by the debtor as a tenant by the entirety was in fact "orally confirmed" by the bankruptcy court, but the debtor died before the order was "reduced to a formal written order". The court's decision appears to be based on the ground that it would not be equitable to withdraw the property from the estate after the reorganization had been voted on, rather than on a close analysis of the

statute. The case is distinguishable on that ground, in my view, or alternatively, wrongly decided.

My ruling that the property may not be sold after the death of the debtor is based on the assumption that a genuine tenancy by the entirety existed between the debtor and his wife. This assumption has been explicitly challenged by the administrator of the estate of the debtor's mother. He alleges that the tenancy by the entirety was a sham in fraud of creditors. This allegation has never been tried before the bankruptcy judge, and no findings of fact appear by stipulation or otherwise. These allegations clearly must be resolved. If the tenancy by the entirety was created in fraud of creditors, the bankruptcy judge is empowered to set it aside and treat the property as wholly the debtor's.

Accordingly, the case is remanded for

an evidentiary hearing and findings as to whether the purported tenancy by the entirety was a sham in fraud of creditors.

S/ Walter J. Skinner

United States District Judge

UNITED STATES COURT OF APPEALS
First Circuit

Argued Aug. 8, 1985

In re George ABDALLAH, Debtor,

Appeal of DONAHUE & DONAHUE,
Appellant.

In re George ABDALLAH, Debtor,

Appeal of Richard DRURY, Administrator
of the Estate of Mary T. Abdallah, et al,
Appellant.

In re George ABDALLAH, Debtor,

Appeal of Allen H. ROFFMAN, Appellant

Nos. 85-1105, 85-1106 and 85-1152

TORRUELLA, Circuit Judge.

This case is before us on appeal from a decision by the District Court of Massachusetts, affirming the denial of a motion to compel the sale of property. The motion was denied in the first instance by the bankruptcy court of that district in the case of the estate of debtor George Abdallah.

Abdallah filed a Chapter 7 proceeding on October 8, 1980. On July 28, 1981,

while the proceedings were still in progress, the debtor died. On July 30, 1982, special counsel to the Trustee filed an adversarial motion to compel the sale by public auction of certain real property under 11 U.S.C. S363(h). Eva Abdallah, widow of the debtor, filed various objections and a request for jury trial, alleging that as tenant by the entirety with her deceased spouse, she alone now had title to the parcels in question, clear of the bankruptcy proceeding.

The bankruptcy courts 39 B.R. 384, held that upon the death of the debtor, full title in the tenancy by the entirety property vested in the widow and accordingly there was nothing upon which Section 363(h) could operate. The decision rendered all further consideration under that section moot. The petitioners appealed to the district court, which upheld the decision in part,

arriving at the same result regarding the nature of a valid tenancy by the entirety, but basing its ruling upon federal rather than state law. Confronted with serious allegations that the debtor and his wife created the tenancy by the entirety to defraud his creditors, the court remanded the case for an evidentiary hearing to determine the real parties in interest.

[1,2] Appellants' core issue on appeal is whether 11 U.S.C. S363 authorizes the sale of real estate in which the nondebtor spouse claims an interest as a tenant by the entirety, after the death of the debtor, where, but for the bankruptcy proceeding, the full title would immediately vest in the surviving spouse. We find that the appeal of this issue is premature. The decision of the district court on an appeal from a bankruptcy judge's final order is not itself final if the district court's

decision remands the case to the bankruptcy court for significant further proceedings. Under those circumstances, the district court's decision is not automatically appealable to the court of appeals. Matter of Riggsby, 745 F.2d 1153, 1156 (7th Cir. 1984). See also 28 U.S.C. S158(d).

Still unresolved here, is the validity of the creation of the tenancy by the entirety. If the trial court finds that it was created to defraud creditors and that the complete title rests in the debtor's estate, any pronouncement we might now make on the tenancy by the entirety vis-a-vis the bankruptcy proceedings would be rendered academic.

In an effort to avoid piecemeal adjudication of the case, we abstain at this time from deciding the issues of the constitutionality of the remand and Mrs. Abdallah's standing to object to the

sale.

[3-5] Appellee points out that two appellants, creditor Donahue & Donahue and trustee Roffman, failed to file timely notices of appeal from the bankruptcy court to the district court, see Bankruptcy Rules 8002(a) and (c). Compliance with this requirement is both mandatory and jurisdictional. U.S.M. Corp. v. G.K.N. Fasteners Ltd., 578 F.2d 21, 22 (1st Cir. 1978). Untimely notice of appeal deprives the district court of jurisdiction to review the bankruptcy court's order. Matter of Ramsey, 612 F.2d 1220, 1222 (9th Cir. 1980). While this may have had no practical effect over the district court's review of the order, this court's jurisdiction can only be based on a proper exercise of jurisdiction by the court below. Id. We, therefore, are without jurisdiction over those appellants' appeals of these issues.

The appeals of Donahue & Donahue, No. 85-1105 and Allen H. Roffman, No. 85-1152, are dismissed for lack of jurisdiction. The order of the district court as to these two appellants is hereby vacated and the case is remanded so that said court may dismiss their appeals from the bankruptcy court. The appeal of Richard Drury, No. 85-1106 is dismissed without prejudice because the district court's order was not final.

FOOTNOTES

From the Body of the Case

1 Creditors Drury and Donahue & Donahue joined the motion some time later.

2 Appellants argue that under the doctrine of Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), reference back to the bankruptcy court would constitute an unconstitutional delegation of power to a non-article III judge.

3 Prior to the filing of the bankruptcy petition, the property of both the debtor and his wife was placed in state court receivership. Appellants argue that Mrs. Abdallah does not have standing to object to the sale, especially since the state court receiver has given his consent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1106

IN RE
GEORGE ABDALLAH,
Debtor,

RICHARD DRURY, ADMINISTRATOR OF THE ESTATE OF MARY T. ABDALLAH, ET AL., APPELLANTS

JUDGMENT

Entered: December 2, 1985

This cause came on to be heard on appeal from the United States District Court for the District of MASSACHUSETTS, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeal is dismissed for lack of appellate jurisdiction.

By the Court:
Francis P. Scigliano, Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-106

IN RE:
GEORGE ABDALLAH,

RICHARD DRURY, ADMINISTRATOR OF THE ESTATE OF MARY T. ABDALLAH, ET AL
Appellants.,

Before

Campbell, Chief Judge,
Bownes and Torruella, Circuit Judges.

CORRECTED JUDGMENT

Entered: December 31, 1985

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The appeal of Richard Drury is dismissed without prejudice because the district court's order was not final.

By the Court,

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1105
IN RE GEORGE ABDALLAH,
Debtor

DONAHUE & DONAHUE
Appellant.

No. 85-1106
IN RE GEORGE ABDALLAH,
Debtor

RICHARD DRURY, ADMINISTRATOR OF THE
ESTATE OF MARY T. ABDALLAH, ET AL
Appellant.

No. 85-1152
IN RE GEORGE ABDALLAH,
Debtor,

ALLEN H. ROFFMAN,
Appellant.

Before

Campbell, Chief Judge,
Coffin, Bownes, Breyer and Torruella
Circuit Judges

ORDER OF COURT

Entered: December 31, 1985

The suggestion for the holding of a rehearing en banc in the above-captioned

cases having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the court en banc.

It is ordered that the suggestion for rehearing en banc in the above-captioned cases be hereby denied.

By the Court:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1106

IN RE:
GEORGE ABDALLAH,

RICHARD DRURY, ADMINISTRATOR OF THE
ESTATE OF MARY T. ABDALLAH, ET AL,
Appellants.

Before

Campbell, Chief Judge
Bownes and Torruella, Circuit Judges.

ORDER OF COURT

Entered: December 31, 1985

Upon consideration of the petition for rehearing on behalf of appellant Richard Drury,

It is ordered that said petition for rehearing be denied.

By the Court,

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 85-1152

IN RE; GEORGE ABDALLAH,DEBTOR

ALLEN H. ROFFMAN,Appellant

Before

Campbell,Chief Judge,

Bownes and Tourella, Circuit Judges

ORDER OF COURT

Entered: December 31, 1985

The petition for rehearing in the above-captioned case is hereby denied.

The judgment of this court in the above-captioned case is corrected and modified as follows:

The appeal is dismissed for lack of appellate jurisdiction, and the cause is remanded to the district court with directions to take evidence on, and to determine, whether or not the appeal of Allen H. Roffman was timely filed. It it is determined that it was timely, the

district court need not dismiss the appeal from the bankruptcy court as directed in this court's opinion of December 2, 1985.

By the Court:

Francis P. Scigliano,Clerk

[N.B.:identical order issued in 85-1105, Donahue & Donahue Appellant].

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 4

Section 8: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To establish an uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States;

11 U.S.C. s.363

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2572

.....

(b) The trustee, after notice and a hearing, may use, sell or lease other than in the ordinary course of business, property of the estate.

...

(d) The trustee may use, sell or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold or leased by the trustee, the court shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection

of such interest. In any hearing under this section, the trustee has the burden of proof on the issue of adequate protection.

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of any entity other than the estate, only if --

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of such interest;
> (4) such interest is a bona fide dispute; or
> (5) such entity could be compelled in a legal or equitable proceeding to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section and the interest of any co-owner in property in which the debtor had, immediately before the commencement of the case, an undivided undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if-

> (1) partition in kind of such property among the estate and such co-owners is impracticable;
> (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;
> (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweights the detriment, if any, to such co-owners; and
> (4) Such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h)

of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, if the holder of such claim purchases such

property, such holder may offset such claim against the purchase price of such property.

(l) The Trustee may use, sell, or lease property under subsection (b) or (c) of this section or a plan under chapter 11 or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial conditions of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of a taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under

subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may void a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees or expenses incurred in voiding such sale or recovering such amount. The court may grant judgment in favor of the estate and against any such party that entered into such agreement in

willful disregard of this subsection for punitive damages in addition to any recovery under the preceding sentence.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2607. Amended by Sec. 478 of Pub.L. 98-353, July 10, 1984, 98 Stat. 333.

11 U.S.C. S725
Disposition of Certain Property

After the commencement of a case under this chapter, but before final distribution of property of the estate under section 726 of this title, the trustee, after notice and a hearing, shall dispose of any property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title.

[S 1293. Repealed, Pub.L.,87-189, S3, Aug.30, 1961, 75 Stat.417]

Codification. Section 236(a) of Pub.L., 95-598, Nov. 6, 1978, 92 Stat. 2667, added section 1293 which reads as follows:

"S 1293, Bankruptcy Appeals

"(a) The courts of appeals shall have jurisdiction of appeals from all final decisions of panels designated under section 160(a) of this title,

"(b) Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy Court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals."

Section 113 of Pub.L. 98-353, July 10, 1984, 98 Stat. 343, (effective June 27,

1984 pursuant to Section 122(c) of Pub.L. 98-353) provided that this amendement "shall not be effective". Section 121 of Pub.L. 98-353 (effective on July 10, 1984 pursuant to section 122(a) of Pub.L. 98-353) provided that this amendment shall take effect on July 10, 1984.

Pub.L. 98-353, title I, s104(a), July 10, 1984, 98 Stat. 341. Codified as 28 U.S.C.s158

s158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees

entered under subsections (a) and (b) of this section.

Effective Date. Section effective July 10, 1984, see section 122(a) of Pub.L. 98-353, set out as an Effective Date note under section 151 of this title.

State and Territorial Statutes and Judicial Proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its

Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c.649, 62 Stat.947.

ANTI-INJUNCTION ACT
28 USC s2283 (1976)

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

BANKRUPTCY RULES

Rule 1016, Death or Insanity of Debtor

Death or insanity of the debtor shall not abate a liquidation case under chapter 7 of the code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or insanity had not occurred. If a reorganization or individual's debt adjustment case is pending under chapter 11 or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or insanity had not occurred.

ADVISORY COMMITTEE NOTE

The rule is derived from former Rules 118 and 11-16. In a chapter 11 reorganization case or chapter 13 individual's debt adjustment case, the likelihood is that the case will be dismissed.

RELEVANT EXCERPTS

96th Congress
2nd Session

Report
No. 96-1195

HOUSE OF REPRESENTATIVES

AN ACT TO CORRECT TECHNICAL ERRORS, CLARIFY AND MAKE MINOR SUBSTANTIVE CHANGES TO PUBLIC LAW 95-598.

July 25, 1980 -- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Rodino, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany S. 658]

The Committee on the Judiciary, to whom was referred the bill (S. 658) to correct technical errors, clarify and make minor substantive changes to Public Law 95-598, having considered same, report favorably thereon with an amendment and recommend that the bill as amended do

pass.

The amendment to the text of the bill is a complete substitute therefor and appears in italic type in the reported bill.

INTRODUCTION

The Bankrupty (sic) Reform Act of 1978 has now been in effect less than one year. It is clear even at this early time in the life of this law that technical amendments are required. Errors in printing, spelling, punctuation, grammar, syntax and numeration arose in the bill as enacted because of the last-minute process of change through which the bill went when considered at the closing sessions of the 95th Congress.

These same last-minute changes also resulted in the enactment of a bill that contains incongruent provisions; material that was removed from earlier versions remained as either cross-references or

antecedents for provisions changed or inserted. And, material added often was not completely integrated into the total fabric of the bill as enacted.

Such matters constitute the vast majority of the subject of the Technical Amendments Act. In addition, however, there are several items of a substantive nature which are included because: (1) it was intended that the particular subject was to be dealt with at the earliest possible time after the enactment of the Bankruptcy Refore (sic.) Act in connection with whatever technical amendments would be considered; (2) further conforming changes were found to be necessary to complete the legislative work intended by the Bankruptcy Reform Act; (3) the treatment of a subject in the Bankruptcy Reform Act was found to be incomplete; or (4) there was overlooked some minor yet relevant matter. In each case the change

proposed is consistent with polices adopted by Congress in its enactment of the Bankruptcy Reform Act.

Event with these substantive matters included and noting that they are consistent with the Bankruptcy Reform Act, nevertheless it i important to repeat that the Act as amended by this bill continues to represent a finely tuned and balanced treatment of the respective interests of debtors and creditors. Every effort has been made to abstain from reacting legislatively at every call for change and to maintain existing policy intact. At this time, there are known areas of bankruptcy activity which give the Committee concern and which the Committee intends to monitor closely. However, it is also premature to change a statute that has been effect for such a short period of time where it is not really known to what extent these concerns are other than

transitory.

....

Subsection (d). This amendment makes it clear that when the trustee sells property in which the estate holds a joint interest, that joint interest shall have been severed when the property became property of the estate and the other (non-estate) joint-owner shall receive from the sale an aliquot portion of the proceeds, not an actuarially determined amount.

....

SEC. 26. (a) Section 363(a) of title 11 of the United States Code is amended by inserting "whenever acquired" immediately after "equivalents" and by inserting "and includes the proceeds, products, offspring, rents or profits of the property subject to a security interest as provided in section 552(b) of this title whether existing before or after the

commencement of a case under this title" immediately after "interest".

(b) Section 363(e) of title 11 of the United States Code is amended --

(1) by inserting ",with or without a hearing," immediately after "court"; and

(2) by striking out the last sentence.

(c) Section 363(f)(3) of title 11 of the United States Code is amended by striking out "such interest" the second place it appears and inserting "all liens on such property" in lieu thereof.

(d) Section 363(h) of title 11 of the United States Code is amended by striking out "immediately before" and inserting "at the item of" in lieu thereof.

(e) Section 363(j) of title 11 of the United States Code is amended by striking out "compensation" and inserting "compensation" in lieu thereof.

(f) Section 363(k) of title 11 of the United States Code is amended by striking out "if the holder" and inserting "the holder of such claim may bid at such sale, and, if such holder" in lieu thereof.

(g) Section 363 of title 1 of the United States Code is amended --

(1) by striking out "conditions" and inserting "condition" in lieu thereof;

(2) by striking out "a taking" and inserting "or the taking" in lieu thereof; and

(3) by striking out "interests" and inserting "interest" in lieu thereof.

(h) Section 363(n) of title 11 of the United States code is amended --

(1) by striking out "void" and inserting "avoid" in lieu thereof;

(2) by striking out "voiding" and inserting "avoiding" in lieu thereof; and

(3) by amending the last

sentence to read as follows: "In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection."

(i) Section 363 of title 11 of the United States Code is amended by adding at the end thereof the follow new subsection:

"(o) In any hearing under this section --

"(1) The trustee has the burden of proof on the issue of adequate protection; and

"(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MASSACHUSETTS

In Re:	
GEORGE ABDALLAH Debtor	Chapter 7 Case No. 80-01759-L

ADVERSARIAL MOTION BY RICHARD G. KAGAN TRUSTEE FOR LEAVE TO SELL AT PUBLIC AUCTION REAL ESTATE LOCATED IN LOWELL, TYNGSBORO AND CHELMSFORD, MASSACHUSETTS, PURSUANT TO SECTION 363(h) AND 725 OF THE UNITED STATES BANKRUPTCY CODE.

Now comes Richard G. Kagan, the duly appointed qualified and acting Trustee of the Estate of George Abdallah ("Trustee") and moves pursuant to Section 363(h) and 725 of the United States Bankruptcy Code for leave to sell real property in Lowell, Tyngsboro and Chelmsford as more fully identified herein, at public auction sale with all claims of interest to attach to the proceeds of such sale.

In support of this motion, the Trustee states as follows:

1. On October 8, 1980, George Abdallah filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Subsequently, on October 10, 1980, Richard G. Kagan was duly appointed as trustee.

2. Prior to the commencement of this proceeding, various creditors of the debtor had commenced actions in the Probate and Family Court, the Middlesex Superior Court, and the District Court of Lowell, and obtained in those actions various attachments, judgments and levies against the various parcels of real estate which they claimed was owned and/or fraudulently conveyed by the debtor.

3. Even with the substantial litigation which proceeded the filing of the petition and continues thereafter, substantial disputes exist over the right, title and interest of the various parties in the following parcels of real estate.

a. certain parcels of real estate located in Lowell designated as 203-205 Branch Street, Lowell, Middlesex County, Massachusetts

b. a certain parcel of real estate located in Tyngsboro designated as 409 Middlesex Road, Tyngsboro, Middlesex County, Massachusetts

c. certain parcels of real estate located Tyngsboro designated as 54-56 Locust Avenue, Tyngsboro, Middlesex County, Massachusetts

d. a certain parcel of real estate located in Tyngsboro designated as 60 Locust Avenue, Tyngsboro, Middlesex County, Massachusetts

e. certain parcels of real estate located in Chelmsford designated as lots nos. 20,21,28,29 and a portion of lot 9 and a portion of lot 8 on a plan entitled "Plan of Columbia Park, North Chelmsford, Massachusetts recorded

Middlesex Registry of Deeds North District Plan Bk 19 Plan 40.

f. certain parcels of real estate located in Lowell on Andover Street, Lowell, Middlesex County, Massachusetts, more fully described in the deed from Louis Saab to Eva Abdallah recorded Middlesex Registry of Deeds North District Bk. 1898, pg. 604-605.

4. In addition to disputes over the right title and interest of various persons to the properties there exist disputes over the existence and validity of mortgages recorded against the properties.

5. Pursuant to Section 363(h) and 725 of the United States Bankruptcy Code, a trustee is authorized to sell or dispose of property in which any entity other than the estate claim an interest. Accordingly, pursuant to those sections of

the United States Bankruptcy Code, the Trustee seeks leave of this court to dispose of the above designated properties by public sale with any liens and claims of interest to attach to the proceeds of the sale.

6. The allowance of this motion would be in the best interest of the Estate, its creditors and all other parties in interest because substantial unpaid real estate taxes have accrued and continue to accrue on the property, there are substantial clouds on the title to the properties which make their sale unpracticable by any other means, certain of the properties are not being maintained and it is unlikely that various disputes will be resolved in the near future.

WHEREFORE, the Trustee, Richard G. Kagan, respectfully prays that this Court enter the following orders:

1. Granting the Trustee leave to sell

the within identified real property at public auction with all liens and other claims of interest to attach to the proceeds of such sale.

2. For such other and further relief as this Court may deed just and proper.

RICHARD G. KAGAN, TRUSTEE

By his Attorneys,
RIEMER & BRAUNSTEIN

Charles R. Bennett, Jr.
Riemer and Braunstein
Three Center Plaza
Boston, Massachusetts 02108
Telephone: (617) 523-9000

UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF MASSACHUSETTS

IN RE:

	)	Chapter 7 case
George Abdallah	)	80-01759-L
Debtor	)	MOTION TO COMPEL
	)	SALE OF ASSETS

On or about July 29, 1982, a Motion for Leave to Sell Assets was filed by Special Counsel to the Trustee in Bankruptcy, Riemer and Braunstein.

Said Motion contained reference to many parcels of real estate, some allegedly owned by the Debtor and his wife as tenants by the entirety, others purchased from the wife in the past by alleged innocent bona fide third parties without notice. Counter allegations were made that the wife was an attached trustee of the husband and a straw for his interests, and that accordingly the transfers were not to innocent purchasers.

Accordingly, the parcels of real estate listed in the Trustee's Petition

are divisible into two district categories.

Category One: Parcels a, b, and c of Trustee's Motion.

Category Two: Parcels d, e, f of Trustee's Motion.

Category One parcels involve issues relating to the interest of the wife in tenancy by the entirety property. The parcels consist of three rental properties and the personal residence of the Debtor including twenty-five (25) plus segregable acres of land.

Category Two parcels involve a determination of the rights of an attaching creditor under State law as such involve a mix of Bankruptcy Act and non-Act issues. CATEGORY TWO PARCELS are not the subject of this motion.

The issue for the Court to determine, as stated above, is the wife's claim upon the value of the real estate which had

been a tenancy by the entirety before the filing. Counsel for the wife contends that after Debtor's death, wife inherits, and there is nothing for the Court to realize upon.

Counsel for the majority creditor cites s363 and Judge Lavien's recent article (The Eclipse Massachusetts Tenancy by the Entirety, Vol.67 #4, Massachusetts Law Review) in support of its contention that upon the filing the tenancy should be treated as a tenancy in common, the non-bankrupt tenant bearing the burden of proving contribution to claim an interest in s363 proceeds.

This is uniquely an issue of law in the first instance for the Court to determine, coupled with subsidiary findings of fact as required by s363.

Accordingly, the Creditor moves:

1. That the Trustee Alan H. Roffman be ordered to present to the Court a s363

petition for leave to sell for all Category One Parcels.

or in the alternative that:

2. The petition already filed by the Special Counsel be brought forward with the modifications that:

a. Category One parcels only are included and that Alan H. Roffman, Esq., be substituted for Richard Kagan, Esq., as Trustee (Kagan, Esq., was mistakenly named in the first petition as Trustee - he is counsel to the Trustee).

Respectfully Submitted:
Richard Drury, Administrator of the
Estate of Mary T. Abdallah

By_____

S. James Boumil, Esq.
100 Summit Street
Lowell, MA 01852
458-0507

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS SUPERIOR COURT
No. 79-5914

Richard Drury, Administrator, Estate of Mary Abdallah

v

George Abdallah, Eva Abdallah

Copy of
ORDER APPOINTING RECEIVER

This action came on to be heard upon the return of an order of notice to show cause why a receiver should not be appointed as prayed for in the complaint, and was argued by counsel (for the plaintiff, ---- the defendant, although duly served with process, not being present or represented by counsel); and thereupon, upon consideration thereof, it is ORDERED AND ADJUDGED:

1. That until further order of the court,

George Broomfield Esq. of 18 Tremont St., Boston, MA 02108 be and hereby is

appointed receiver of the estate property, monies, debts and effects of every kind and nature of or belonging to the defendants

;and he is hereby authorized and directed to collect, get in, and take charge of all and singular thereof, and to hold the same subject to the further order of the court.

2. That the said defendant, its officers, servants, agents and attorneys, and each of them are hereby required and ordered to deliver to said receiver all the property, monies, stock in trade and effects of every kind and nature, belonging to the said defendant in their hands, possession or control, together with all books, deeds, documents, vouchers and papers relating thereto, and the said defendant and its officers, servants, agents and attorneys and each of them, are hereby restrained and enjoined from

collecting any of the debts or accounts due to the said defendant and from using, spending, injuring, conveying, transferring, selling or in any manner disposing or encumbering any of the effects or property aforesaid, except to deliver them into the hands of the receiver.

3. That said receiver shall deposit all monies received by him in some national bank, trust company or savings bank in his name as receiver, but no disbursements of said funds shall be made by said receiver without further order of the court.

4. That the said receiver is required to file in the office of the clerk of this court, within thirty days after the date of entry of this order, under oath, a detailed inventory of the property of which he has possession or the right of possession, with the estimated values

thereof, together with a list of the encumbrances thereon, and also a list of the creditors of the receivership and of the said defendant so far as known to him.

5. That the said receiver, before entering upon the performance of his duties under this order, shall give good and sufficient personal bond, in form running to the Commonwealth of Massachusetts, for the faithful performance of his duties, in the penal sum of $130,000. to be approved by the court; and upon receipt of assets by said receiver to an amount or value exceeding the penal sum of said bond said receiver shall forthwith apply to this court for an order determining whether or not the penal sum of his bond shall be increased to such amount as the court may deem appropriate.

6. That either of the parties, or the said receiver, may apply to the court from time to time for such further direction,

or orders as may be necessary.

By the court, (Flaksman.)

Leona M. Kusmirek
Deputy Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Docket #SP-29443

RICHARD DRURY, Administrator,)
Creditor)
)
vs.)
)
GEORGE ABDALLAH, Debtor)

Before: Judge Arthur Williams.

Appearances:

S. James Boumil, Esq., 100 Summit Street, Lowell, Massachusetts 01852; Appearing for the Creditor.

Harry Edwards, Esq., 18 Tremont Street, Boston, Massachusetts; appearing for the Defendant.

Lowell District Court
Lowell, Massahusetts
Wednesday, February 14, 1979
2:30 o'clock p.m.

TESTIMONY OF EVA ABDALLAH

TRANSCRIPT PAGE 21

2/14/79

Q Does your husband make the mortgage payment or do you?

A. Does he what? I don't know. I really can't tell you. I don't know anything about the money matters. I can't help you there.

Q You don't make out any checks for mortgage payments?

A. No, I don't.

Q You don't make out any checks for household bills?

A. He takes care of even the electrical bill and everything. He gives me food money and that's it.

Q Now Mrs. Abdallah, do you have any interest in the property located on Brown (sic - "Branch") Street in Lowell?

A. No.

Q Are you aware that your husband deeded you an interest in the property located at Brown (sic - "Branch") Street in Lowell?

A. Yes.

TRANSCRIPT PAGE 22

Q Did you pay him anything for that?

A. No

Q You have an interest in the property located on Locust Avenue in Tyngsboro?

A. Yes

Q And your husband deeded you that?

A. It was taken over for the mortgage, yes.

Q And did you pay anything on that property?

A. No, no money involved.

Q Do you have an interest in a property located on Middlesex Road in Tyngsboro which houses the Tomascoes Ice Cream Stand?

A. No.

Q Are you aware that your husband deeded you an interest in that?

A. What do you mean? Both names are on a --

Q Yes, are you aware that your husband gave you a deeded interest in that property?

A. That's how much I know, your Honor. I don't know anything about what's going on.

THE COURT: The answer is she doesn't know.

Q Did you pay for an interest in that property?

A. I don't --

TRANSCRIPT PAGE 23

Q Just answer to the best of your knowledge?

A. Did I pay?

Q Yes. The time you acquired your interest in the property in Middlesex

A. You mean years ago when that property was bought?

Q No, Mrs. Abdallah, when you acquired your interest in it, did you give anything of value to your husband for that interest?

A. I don't have any interest in it.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

BANKRUPTCY HEARING IN THE MATTER OF:	
GEORGE ABDALLAH, Debtor	Case No. 80-01759-L

U.S. Post Office and Courthouse
Boston, Massachusetts

Wednesday, January 12, 1983

BEFORE:

Thomas W. Lawless, Bankruptcy Judge

APPEARANCES:

RIEMER & BRAUNSTEIN, by Charles R. Bennett, Jr., Esq., 3 Center Plaza, Boston, Massachusetts 02108, counsel for the Trustee

KAGAN AND KAGAN, by Richard G. Kagan, Esq., 89 State Street, Boston, Massachusetts 02109, Trustee

Jordan L. Shapiro, Esq., 398 Pleasant Street, Malden, Massachusetts 02148 Counsel for George Abdallah, Jr., Construction

S. James Boumil, Esq., 100 Summit Street, Lowell, Massachusetts 01852

MR. BENNETT: All I would ask, your Honor is that everything just be simply continued generally.

THE COURT: Yes. I'll take it off my list in the way of the petition.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MASSACHUSETTS

Bankruptcy proceedings in re:	*	
	*	
GEORGE ABDALLAH (MOTION FOR	*	
	*	No.
PROTECTIVE ORDER, MOTION TO	*	80-1759
	*	
QUASH)	*	
	*	

BEFORE: Honorable Thomas C. Lawless

PLACE: United States District Court
11th Floor
John W. McCormack
P.O. & Courthouse
Boston, Massachusetts 02109

TIME: 10:00 a.m.

DATE: May 25, 1983

APPEARANCES:

FRANCIS K. MONARSKI, Esq., 550 Merrimack Street, Lowell, Massachusetts 01854
FOR: Eva Abdallah

SYLVESTER J. BOUMIL, Esq., 100 Summit Street, Lowell, Massachusetts 01852
FOR: Moving Party

TRANSCRIPT 5/25/83

Page 11

THE COURT: ...Anyway the protection of the rights of the widow to the extent that she is entitled, when the husband died, at some point, she has a converted tenancy by the entirety.

In a tenancy in common, that's where she is. Why don't you file some kind of pleadings, and I will at least dispose of that.

MR. MONARSKI: We have filed a detailed answer.

TRANSCRIPT 5/25/83 - PAGE 13

THE COURT: You've got to understand. This is a Bankruptcy Court. If I wanted to, I couldn't get involved in the state matter.

Apparently, the mother died. Apparently at that point, the man went

bankrupt. And he is alleged to have done several things that he should not have done.

He died, and he leaves a widow. And when the tenancy by the entirety was converted to a tenancy in common, she has some rights. I can protect them because I can define the title.

This is where I am. I think I know a little about tenancy in common and tenancy by the entirety. I am prepared to rule on the question of title here.

I have to see that the estate gets its rights, and that the widow gets her rights. I don't see why you're wasting all the time in the State Court. If it's in front of me on an appropriate

hearing, I will develop the bankground facts to save whatever time, and this thing can go on forever.

In fact, the State Court's twelve years or more, I don't want to fool with what they are doing. They may be another ten or twelve years. I know what I am supposed to do.

If you will file an appropriate pleading that is the definition of the right of title, I'll get rid of it for you.

TRANSCRIPT 5/25/83 - PAGE 18

THE COURT: You have got a situation where in the event that the other tenant in common is not involved. She owns. That's where this is.

As far as I know, there is no way that you can say she is a tenant or anybody else. If you will listen to me, you will see what I am talking about. And you will get something in front of me that asks me to define the title to this

property. And I will do it.

I think you're at cross purposes, and you're going to stay there forever, unless you do what I tell you.

MR. MONARKSI: Thank you, Your Honor.

MR. BOUMIL: Thank you, Your Honor.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

A.C.80-0242-CV

RICHARD DRURY, Administrator

vs.

GEORGE ABDALLAH and EVA ABDALLAH

MEMORANDUM AND ORDER

Upon the petition and response, and the submissions in connection therewith; counsel having been heard and due consideration having been had, the relief requested in the petition is denied. In view of the protracted course of this litigation, the final judgments of the Probate Court, and the recalcitrance of the defendants with regard to satisfaction of the judgments, the judge was amply warranted in appointing a receiver as to the assets of George Abdallah. Some showing has been made that appointment of a receiver as to Eva's interests might be premature, but any deficiencies in this

respect can be remedied by the parties or at the initiative of the experienced and competent receiver (who was present at the hearing and is well aware of the scope of his authority) by further proceedings in the trial court; in any event, the defendants' arguments as to Eva's interests do not establish an abuse of discretion with respect to the challenged order.

By the Court, (Greaney, J)

Assistant Clerk

Entered: September 19, 1980.

LANGAN,DEMPSEY,BRODIGAN
A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
40 BROAD STREET
BOSTON, MASSACHUSETTS 02109

* (617) 542-1871

December, 26, 1985

Clerk, U.S. Bankruptcy Court
McCormack Post Office & Courthouse
Boston, Massachusetts 02109

IN Re George Abdallah
Case NO. 80-01859-L

Dear Sir/Madam:

Enclosed please find a Request for Production of Documents and Interrogatories Propounded by Eva Abdallah in connection with the above-entitled matter. Kindly docket and file same.

Thank you for your cooperation.

Very truly yours,

James M. Langan,Jr.

*listing of counsel deleted

JML/las
Enclosures
cc: S.James Boumil,Esq.

85-1570

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

IN RE GEORGE ABDALLAH

RICHARD DRURY, ADMINISTRATOR, Petitioner

EVA ABDALLAH, Respondent

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

James M. Langan, Jr.
Langan, Dempsey & Brodigan
40 Broad Street
Boston, MA 02109
(617) 542-1871
COUNSEL FOR THE RESPONDENT

4 copies

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision by the District Court affirming the order of the Bankruptcy Court and remanding for further factual proceedings is ripe for review (i.e. whether the decision is final and appealable at this stage.
2. Whether the findings of fact by the District Court are correct in determining that the requirements of 11 U.S.C. §363(h) (1)-(3) were absent.
3. Whether the non-debtor spouse holding properties as a co-tenant by the entirety had standing to object to a sale pursuant to 11 U.S.C. §363(h).

LIST OF PARTIES

1. Richard Drury, Administrator, Creditor-Petitioner.

2. Eva Abdallah, non-debtor spouse of the decedent debtor, Respondent.

3. Allen H. Roffman, Trustee, and Donahue & Donahue, Creditor were Appellants in the U.S. District Court and the U.S. Court of Appeals (No. 85-1152 and No. 85-1105). These appeals were heard along with the petitioner's as consolidated actions at both appellate levels and involved the same issues for review. Their appeals were dismissed by the U.S. Court of Appeals for lack of appellate jurisdiction by a judgment dated December 2, 1985. By order of the U.S. Court of Appeals for the First Circuit and dated December 31, 1985, the Court remanded these appeals to the U.S. District Court for a factual determination as to whether their appeals were timely filed.

TABLE OF CONTENTS

		Page
I.	REPORTED DECISIONS IN THE COURT BELOW.	1
II.	GROUNDS FOR JURISDICTION	1
III.	CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	2
IV.	STATEMENT OF THE CASE.	2
V.	ARGUMENT	
	1. The Decision by the District Court Affirming the Bankruptcy Court's Order and Remanding it Back for Further Factual Proceedings is not a "Final" Order Within the Meaning of 28 U.S.C. §158(d).	9
	2. The District Court, in Reviewing the Bankruptcy Court's Order, Made the Proper Findings of Fact that the Requirements of 11 U.S.C. §363(h)(1)-(3) Were Absent.	27
	3. The Respondent Eva Abdallah, as Owner of the Real Property, has Standing to Object to a Sale Pursuant to 11 U.S.C. §363(h)	29
VI.	CONCLUSION	33

APPENDIX

U.S. CONSTITUTION, AMENDMENT 5. . . . . A-1
11 U.S.C. §543(a)-(c)(1) . . . . . A-1 to A-2
Bankruptcy Rule 8013. . . . . A-3

TABLE OF CASE, STATUTES AND RULES CITED

Cases	Page
Bell v. American Protective Leage, 163 MaSS. 558, 40 N.E. 857 (1895) . .	30
In re Bestmann, 720 F.2d 484 (8th Cir. 1983)	15,16,18
Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1948)	26
In re Comer, 716 F.2d 168 (3rd Cir. 1983)	12
Matter of Commercial Contractors, Inc., 771 F.2d 1373 (10th Cir. 1985).	25
Commonwealth of Massachusetts v. U.S. Veterans Administration, 541 F.2d 1199 (1st Cir. 1976)	27
In re Delta Services Industries, Etc., 782 F. 2d 1267 (5th Cir. 1986) .	14
In re Emerald Oil Co., 694 F.2d 88 (5th Cir. 1982)	14
In re Exennium, Inc., 715 F.2d 1401 (9th Cir. 1983).	19,20
Forgay v. Conrad, 47 U.S. 201 (1848).	26
In re Four Seas Center, Ltd., 754 F.2d 1416 (9th Cir. 1985)	22,23
Fuentes v. Shevin, 407 U.S. 67 (1972).	32
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).	19,21

Matter of Glover, Inc., 697 F.2d 907
(10th Cir. 1983) (per curiam) 24

Matter of Hansen, 702 F.2d 728
(8th Cir. 1983) cert. den. 463
U.S. 1208 18,19

In re Leimer, 724 F.2d 744
(8th Cir. 1984) 16,17,18

Matter of Marin Motor Oil, Inc.,
689 F.2d 445 (3rd Cir. 1982). 10,12

In re Martinez, 721 F.2d 262
(9th Cir. 1983) 20,21,23

Nigro v. First National Bank
of Boston, 7 Mass.App. 903, 387
N.E.2d 1196 (1979). 31

In re Regency Woods Apartments,
Ltd., 686 F.2d 899 (11th Cir. 1982)
(per curiam). 25

Matter of Riggsby, 745 F.2d 1153
(7th Cir. 1984) 15

In re Robert L. Hallamore Corp.,
40 B.R. 181 (Bank.Mass. 1984) 32

In re Sambo's Restaurants, Inc.,
754 F.2d 811 (9th Cir. 1985). 20,21,23

In re Stanton, 766 F.2d 1283
(9th Cir. 1985) 23,24

Stockbridge v. Mixer, 215 Mass.
415, 102 N.E. 646 (1913). 30

Weiss v. Burr, 484 F.2d 973
(9th Cir. 1973) cert. den. 414
U.S. 1161 28

Wellman v. North, 256 Mass. 496,
152 N.E. 886 (1926) 30,31

Wilson v. Waltham Watch Co.,
293 F.2d 811 (D.Mass. 1924) 31

Statutes

11 U.S.C. §363(h) 2,5,7,9,10,21,22,24,26,29,32
11 U.S.C. §543(a)-(c)(1). 32,33
11 U.S.C. §541(a)(1). 2,29
11 U.S.C. §725. 2,5
28 U.S.C. §158(d) 2,8,14

Treatise

Nolan, Mass. Practice, Equitable Remedies
§§163, 165. 29
C.J.S. Receivers §§104, 105 30

REPORTED DECISIONS IN THE COURTS BELOW

The decision by the U.S. Court of Appeals for the First Circuit is reported at 778 F.2d 75 (1st Cir. 1985). The decision of the U.S. District Court for the District of Massachusetts is reported at 46 B.R. 718 (D.Mass. 1984) and the opinion of the U.S. Bankruptcy Court is reported at 39 B.R. 384 (Bkrtcy.Mass. 1984).

GROUNDS FOR JURISDICTION

The appellant asserts that this Court has appellate jurisdiction pursuant to 28 U.S.C. §1254(1). The U.S. District Court affirmed the decision of the Bankruptcy Court, but remanded it for further factual proceedings. The U.S. Court of Appeals decided that it was without appellate jurisdiction and remanded it back for these further proceedings. The respondent Eva Abdallah contends that this Court is without jurisdiction in that there is no final judgment from either the District

Court or the Court of Appeals from which an appeal can properly be taken.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved in this matter is the Fifth Amendment to the U.S. Constitution. The statutory provisions involved herein are 11 U.S.C. §§§541(a)(1), 363(h), 725 and 28 U.S.C. §158(d). In addition, Bankruptcy Rule 8013 is also involved in this appeal. Those provisions not included in petitioner's Appendix, the U.S. Constitution Fifth Amendment, 11 U.S.C. §543(a)-(c)(1) and Bankruptcy Rule 8013, are set forth in this Appendix herein.

STATEMENT OF THE CASE

Mary T. Abdallah died in 1965 leaving four (4) children as her heirs. One of these heirs was the debtor, George Abdallah. The petitioner Richard Drury, as successor Administrator of the Estate of Mary T.

Abdallah, obtained a judgment against the debtor on April 10, 1978. Subsequently, two daughters of Mary T. Abdallah (also her heirs) assigned all their rights in the estate to Selma Boumil, another daughter and also an heir to the estate of Mary T. Abdallah.

In 1979 the petitioner, Richard Drury Administrator, as a judgment creditor, obtained on an ex parte basis receivership in the Massachusetts Superior Court for Middlesex County against the assets of George Abdallah and his wife, Eva Abdallah. At no time has the petitioner Drury ever obtained a judgment or an execution against Eva Abdallah. Neither has any claim against her been litigated or heard on its merits.

The debtor, George Abdallah, filed a Chapter 7 Bankruptcy Petition on October 8, 1980 with the U.S. Bankruptcy Court for the District of Massachusetts (Docket No. 80-01759-L). At the time the debtor filed his bankruptcy petition and at all times relevant

and material to this appeal, the debtor was married to Eva Abdallah. At the time the debtor filed his bankruptcy petition, he was the joint owner of certain parcels of real property in Tyngsboro and Lowell, Massachusetts. The title to these parcels of real property was held in the name of the debtor and Eva Abdallah, husband and wife, tenants by the entirety. The title to these parcels remained in a tenancy by the entirety throughout the bankruptcy proceedings. All the real property was listed on the debtor's schedule of assets.

On July 28, 1981, while the bankruptcy proceeding was still pending the debtor, George Abdallah, died. At the time of his death there had been no activity undertaken by the trustee in bankruptcy or by any of the creditors against the parcels of property held in a tenancy by the entirety. On July 29, 1982, a full year after the debtor's death, the trustee in bankruptcy filed an adversarial

motion to sell the debtor's real estate under §363(h) and §725 of the U.S. Bankruptcy Code. Eva Abdallah, the debtor's wife, filed an answer and objection to the trustee's adversarial motion. The widow contended that she was the full title holder of all the parcels of property held in a tenancy by the entirety by virtue of her surviving the debtor. After a hearing on January 13, 1983 wherein the Court considered the adversarial motion and the written objection thereto, the Court denied the trustee's motion.

Thereafter, on June 13, 1983, Richard Drury, the Administrator of the Estate of Mary T. Abdallah (the debtor's mother) by his attorney, S. James Boumil (the debtor's nephew), brought a motion to compel the sale of these parcels of real estate which had been held by the debtor and Eva Abdallah as tenants by the entirety. The bankruptcy court held three hearings on January 12, 1983; May 25, 1983; and December 14, 1983 (see full

transcript of these proceedings in Appendix filed with the U.S. Court of Appeals for the First Circuit, Page A98-A182). After these hearings and after consideration of all the briefs filed by the parties, the bankruptcy court issued an order dated April 12, 1984 denying the motion to compel the sale of the parcels of real estate.

Thereafter, on April 23, 1984 (after filing a motion to extend time with the bankruptcy court), a notice of appeal was filed by Richard Drury appealing the bankruptcy court's order of April 12, 1984. Subsequently, on May 23, 1984, the trustee Roffman filed his notice of appeal. The creditor, Donahue & Donahue, filed its notice on May 24, 1984. Both these appellants filed their notices outside the ten (10) day limit of First Circuit Appendix D Rule 3(a).

On December 27, 1984, U.S. District Court Judge Walter J. Skinner issued his memorandum and order affirming on other grounds the

bankruptcy court's ruling. The Court stated that the property held by the debtor and his spouse as tenants by the entirety at the commencement of the bankruptcy proceeding, could not be sold pursuant to 11 U.S.C. §363(h), after the death of the debtor. The petitioner Drury, in his brief to the district court, first raised the issue that the debtor's wife, Eva Abdallah, held these properties through a fraudulent conveyance. As a result, the district court remanded the case back to the bankruptcy court for an evidentiary hearing on the issue of whether the proported tenancy by the entirety was in fact a fraudulent conveyance.

The petitioner Drury along with the trustee Roffman and the creditor Donahue & Donahue, appealed the matter to the U.S. Court of Appeals for the First Circuit. The co-tenant by the entirety, Eva Abdallah, filed two motions to dismiss these appeals. She contended that the decision by the district

court was not "final" within the meaning of 28 U.S.C. §158(d); therefore, the court of appeals was without appellate jurisdiction. In addition, Eva Abdallah as appellee stated that the creditor-appellant, Donahue & Donahue, and the trustee-Appellant, Roffman in failing to file their timely notices of appeal from the bankruptcy court, were improper parties to the appeal.

The appellants and the appellee, Eva Abdallah, filed their briefs on the merits and the court of appeals heard oral argument. On December 2, 1985 the Court issued its judgment and opinion. The Court concluded that the appeal by the appellant Drury be dismissed for lack of appellate jurisdiction (as being premature). In addition, the Court dismissed the appeals of the creditor-appellant, Donahue & Donahue, and the trustee-appellant, Roffman for their failure to timely file their notices of appeal. Subsequently, the court of appeals denied the appellants' motion for a rehearing.

The Court, however, entered a corrected judgment on December 31, 1985 remanding to the district court to determine the issue of whether the appellants, Donahue & Donahue, and Roffman timely filed their appeals.

Afterward, the appellant Drury petitioned this Court for a writ of certiorari.

ARGUMENT

1. The Decision By The District Court Affirming The Bankruptcy Court's Order And Remanding It Back For Further Factual Proceedings Is Not a "Final" Order Within The Meaning Of 28 U.S.C. §158(d)

The bankruptcy court entered an order that the debtor's estate had no interest in the properties which had been held by the debtor as a co-tenant by the entirety. Because the debtor was survived by his wife, the Court could not authorize a sale pursuant to §363(h) of the Bankruptcy Code. As appellants on appeal, the creditor Donahue & Donahue and the trustee Roffman along with your petitioner raised, for the first time, an

issue regarding these properties. That is, they stated that the decedent debtor and his surviving spouse had held these properties as a sham in fraud of their creditors. The district court affirmed the decision by the bankruptcy court; however, as a result of this new allegation, the Court remanded the case back to the bankruptcy court for further factual proceedings on this matter.

Under 28 U.S.C. §158(d), there must be a final order or decision by the bankruptcy court before the U.S. Court of Appeals can have appellate jurisdiction. A number of circuits have ruled on the issue of finality when the district court has remanded to the bankruptcy court for further factual proceedings.

The petitioner Drury cites Matter of Marin Motor Oil, Inc., 689 F.2d 445 (3rd Cir. 1982) as supporting his position. In the facts before that appeal, the district court reversed the decision of the bankruptcy court

and did not remand it for further proceedings. As the Court noted, the adversarial proceedings between the parties continued in the bankruptcy court "unaffected by the appeal", 689 at 449 n.2. In addition, the Court in making its ruling stated:

> Where, as in the present case, an appeal is taken from a district court order reversing the bankruptcy court, it may be necessary to examine the district court's analysis as well as that of the bankruptcy court, 689 F.2d at 448 (emphasis in original).

In the instant case, the appeal is not from a district court reversing the bankruptcy court, but affirming the bankruptcy court. The Third Circuit also observed that should it reverse the district court's order, that all further litigation between the parties would be precluded. Here, there is no indication that a reversal of the district court will obviate the need for further litigation between the parties. Also, the parties have not continued to litigate in the bankruptcy court the issue

of title to these properties as was the case in the Marin court. It should also be noted that the Third Circuit announced its narrow holding in its opinion:

> But it is important to stress the limited nature of our holding on jurisdiction. We hold only that when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for the purposes of section 1293(b). Matter of Marin Motor Oil, Inc., 689 F.2d 445, 449 (3rd Cir. 1982).

In a later decision the Third Circuit further refined its position, In re Comer, 716 F.2d 168 (3rd Cir. 1983). The bankruptcy court denied a relief from stay to a secured creditor so he could foreclose on a lot owned by debtor. The district court reversed on appeal and remanded it to the bankruptcy court regarding the application of the mortgage sale proceeds. The Third Circuit held that a review of district court action lifting the stay, would end the controversy between the

parties and that review could not await final disposition of the case in the bankruptcy court. It also noted that even if the district court disposed of a discreet issue, the decision could be final but remain an interlocutory decision concerning the underlying controversy, Marin, 716 at 172. In the case at bar, if the court of appeals reviews the district court order, it may not end the controversy between the parties. In addition, there is no indication that further review cannot await the further factual proceedings in the bankruptcy court. Most importantly, the district court decided that the debtor's estate had no interest to sell the properties which had been held by the debtor as a tenant by the entirety with his non-debtor spouse; however, the underlying controversy of whether a valid tenancy by the entirety existed at all has yet to be determined by the bankruptcy court. These holdings by the Third Circuit do not help the

petitioner, but in fact support the respondent Eva Abdallah's position.

The Fifth Circuit in the appeal of In re Emerald Oil Company, 694 F.2d 88 (5th Cir. 1982) (per curiam) declared that if a matter awaits further proceedings in the bankruptcy court, the decision by the district court is not appealable as a final judgment. The Court further stated that if there was no final determination of the rights between the parties, there was no appellate jurisdiction from the district court to the court of appeals, 694 at 89. The instant case awaits further proceedings concerning the status of title to these properties. Litigation between the petitioner Drury and the respondent Abdallah will proceed on remand in the bankruptcy court; see In re Delta Services Industries, Etc., 782 F.2d 1267 (5th Cir. 1986).

The Seventh Circuit in construing the recently enacted 28 U.S.C. §158(d), held that

remands by the district court to the bankruptcy court are not appealable as a final decision; Matter of Riggsby, 745 F.2d 1153 (7th Cir. 1984). The Court (as well as the Third Circuit) viewed such matters as an interlocutory appeal. The proceedings between the petitioner Drury and the respondent Abdallah is a separate adversarial proceeding within the overall bankruptcy case regarding a controversy over these parcels of real estate. When the issue of the validity to the real property is determined by the bankruptcy court, then this separate proceeding within the bankruptcy case will be final and appealable.

The petitioner Drury cites In re Bestmann, 720 F.2d 484 (8th Cir. 1983) as a case in his favor. In that instance the bankruptcy court determined the issue of the ownership of certain hogs. On appeal, the district court considered the matter an interlocutory order, and dismissed the appeal.

The Eighth Circuit reasoned that it was a final decision in that a refusal to hear the appeal by the court of appeals would forever preclude the issue. Thus, the matter would never receive appellate review. In the case at bar, the district court did not dismiss the appeal, and in fact heard the appeal on the merits. In addition, it remanded it for further factual findings. Unlike the situation in Bestmann, a reversal of the district court decision would not eliminate further litigation between the parties. In addition, the issue of the validity of the title to the parcels of real property still must be decided by the bankruptcy court. The ruling by the district court is capable of appellate review following the factual proceedings in the bankruptcy court.

A similar factual situation was involved in In re Leimer, 724 F.2d 744 (8th Cir. 1984), also cited by the petitioner. The bankruptcy court ruled on the ownership of the land in

question and refused to lift the automatic stay. The district court on appeal viewed the lower court action as an interlocutory matter and in doing so, dismissed the appeal. The Eighth Circuit observed that if the district court did not review the matter, appellate review of the issue must wait until the entire bankruptcy proceeding was concluded. Here, the district court did take appellate jurisdiction and ruled on the issue. Unlike the court in Leimer, the district court remanded it for further factual proceedings. These proceedings will involve the same parties involving a related issue concerning these parcels of real estate. Further, the Court of Appeals for the First Circuit will have an opportunity for appellate review of the issue that was before the district court below. The review by the court of appeals will not be delayed until the overall bankruptcy proceeding is terminated, but only after the factual proceeding on remand is

heard by the bankruptcy court.

The Eighth Circuit, however, did rule on the issue of finality in factual circumstances similar to the case at bar. In the Matter of Hansen, 702 F.2d 728 (8th Cir. 1983) (per curiam) cert. den. 103 S.Ct. 3539, the bankruptcy court decided on a dispute of a claim by a creditor. The district court on review remanded the matter to the bankruptcy court for a de novo trial on an additional factual issue. The court of appeals dismissed the appeal as interlocutory and not a final appealable order.

In short, the Eighth Circuit cases of In re Bestmann, supra, and In re Leimer, supra, cited in support by the petitioner Drury, are clearly distinguishable. The procedural background in those cases are in no way similar to the case before this court. In the Hansen case the district court, upon review, remanded the matter to the bankruptcy court for further factual proceedings. As in

Hansen, the decision by the district court is not final or appealable.

Five cases have been recently decided in the Fifth Circuit concerning finality of bankruptcy matters appealed to the court of appeals. The bankruptcy court, In re Exennium, Inc., 715 F.2d 1401 (9th Cir. 1983) made findings relating to the validity of the sale of certain leases. The Bankruptcy Appellate Panel noted the doctrine of Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) allows appellate review when dismissing the appeal would impede the litigation. In Exennium, the title to the leases had already been decided. During the appellate process, the overall dispute was complicated by uncertainty over responsibility for past-due rents owed the lessor; appellate review at that stage would resolve the matter. In the present case, the bankruptcy court, as fact finder, has not ruled upon the validity of the title to the real property held by the

respondent Abdallah. This interrelated issue should be first decided at the trial level. Unlike Exennium, the facts before this Court involve a remand back to the bankruptcy court.

In the facts before the Court in the later decision of In re Martinez, 721 F.2d 262 (9th Cir. 1983), the Appellate Panel remanded the case to illuminate the bankruptcy court's order. The issue for determination on remand was, inter alia, the form of title of the jointly held real property. The Fifth Circuit reasoned that appellate review at this juncture would cause splintering of the adjudication process. The Court concluded that in light of the remand, the decision was interlocutory.

The petitioner Drury refers to In re Sambo's Restaurants, Inc., 754 F.2d 811 (9th Cir. 1985). The earlier decision by the bankruptcy court determined the validity of a purported proof of claim. The district court on appeal reversed the bankruptcy court and

allowed the appellant to file an amended proof of claim. The Ninth Circuit rightly applied the doctrine in Gillespie v. United States Steel Corp., supra; if it reversed the decision by the district court, the litigation between the parties would effectively end. The validity of the underlying proof of claim (already considered by the bankruptcy court below), is a prerequisite before any further litigation over the negligence claim itself.

In the case at bar, there was a remand by the district court; this was not the situation in the Sambo's case. Secondly, any reversal by the court of appeals would not end the litigation. The essential issue of validity to the title to the real properties must still be decided. In Sambo's, the bankruptcy court had adjudicated the issue of validity; here, the Court must still determine the validity of the title to the real estate. This is an essential step before any appellate review of the debtor's interest for a sale under §363(h)

of the Code.

The Ninth Circuit, In re Four Seas Center, Ltd., 754 F.2d 1416 (9th Cir. 1985) refined its earlier holding In re Martinez, supra. For appellate jurisdiction, it remarked that the lower court must finally decide a "discreet issue". The Ninth Circuit in Four Seas declared:

> When further proceedings in the bankruptcy court will affect the scope of the order, the order is not subject to review in this court under §1293. [The former §158(d)] [cite] 754 F.2d at 1418.

The Court ultimately dismissed the appeal as an interlocutory matter. In the instant case, there are further adversary proceedings on remand regarding the real property in question. The issue of validity of the title to the realty clearly affects the "scope of the order" by the bankruptcy court concerning any sale under §363(h) of the Code. As such, the petitioner Drury's is nonappealable.

In the latest relevant Ninth Circuit case, the Bankruptcy Appellate Panel had affirmed the trial court's decision, In re Stanton, 766 F.2d 1283 (9th Cir. 1985). The Panel, however, remanded to the bankruptcy court for further consideration. The Ninth Circuit reaffirmed its holding in In re Four Seas Center, Ltd., supra. Since the adversary proceedings had not ended and the bankruptcy court must still resolve the controversies between the parties, there is no "final order", Stanton 766 F.2d at 1286. In this latest decision, the Ninth Circuit addressed its earliest decision of Sambo's upon which your petitioner Drury relies:

> At first glance, Sambo's and Martinez seem difficult to reconcile. But, in fact, the cases compliment one another. Sambo's holds that when a bankruptcy court issues a final order and the BAP affirms or reverses, its order is final... [cite] Martinez holds that when the BAP remands for further factual findings related to a central issue raised on

> appeal, that order is not final, and we lack jurisdiction. [cite] [emphasis in original].

The Court further remarked that in light of a remand, it was reluctant to encroach upon the bankruptcy court's fact finding role.

In the case at bar, the bankruptcy court did remand for further factual findings the issue of validity of the title held in a tenancy by the entirety. This is interconnected with authority to sell any interest under §363(h) of the Code. As the Court wisely observed in Stanton, if it reviewed the matter, it may have resulted in "two complete trips through the appellate process", 766 F.2d at 1287. Here too, there may be two separate appeals involving the same parties and related issues. This latest opinion of Stanton indicates the controlling case for the Ninth Circuit.

The Tenth Circuit in the Matter of Glover, 697 F.2d 907 (10th Cir. 1983) (per curiam), the district court remanded to the

bankruptcy court for further proceedings. The Court held that such actions within the bankruptcy framework are not "final". A similar procedural background occurred in the Matter of Commercial Contractors, Inc., 771 F.2d 1373 (10th Cir. 1985). Here again, the district court had remanded the case to the bankruptcy court for further factual hearings. The Tenth Circuit renewed its finality standard that such district court orders are not final or appealable. In this case on petition to this court, the district court also remanded to the bankruptcy court for further proceedings.

The Eleventh Circuit In re Regency Woods Apartments, Ltd., 686 F.2d 899 (11th Cir. 1982), the bankruptcy court reversed the district court decision and remanded for further factual findings. The court did not view the matter as final. Thus, the court of appeals did not have appellate jurisdiction. Here, too, the First Circuit was without

jurisdiction to review what is an interlocutory order.

In sum, the First, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits all support the principle that courts of appeal lack appellate jurisdiction to review district court decisions upon remand to the bankruptcy court. The Third and Eighth Circuit cases cited by your petitioner are distinguishable on the facts from those in the instant case.

In the case at bar, the remand issue of the validity of the title is closely related to the issue of any authorization of sale of these properties under §363(h). Also, the matter has not been completely resolved and the petitioner Drury can raise the matter at any later appeal. Therefore, the collateral order exception does not apply in the present case, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Neither will the petitioner Drury suffer irreparable injury if appellate review is delayed. See Forgay v.

Conrad, 47 U.S. 201 (1848).

2. The District Court, In Reviewing The Bankruptcy Court's Order, Made The Proper Findings Of Fact That The Requirements Of 11 U.S.C. §363(h)(1)-(3) Were Absent

The respondent Abdallah will not address the merits involved in this issue. It would be premature to do so when the court of appeals below has not reviewed this matter.

It should be noted that the petitioner Drury, in his petition before this Court, has attached in the Appendix certain documents in support of his position. Both the Massachusetts state court Order Appointing Receiver at A-75 and the transcript of testimony of Eva Abdallah in a state court proceeding at A-79 to A-82 was not filed at any of the hearings before the bankruptcy court, nor were they included in any of the appeal briefs below. This Court should strike from the Appendix those portions which were not in the record below, Commonwealth of Massachusetts v. U.S. Veterans Administration,

541 F.2d 119 (1st Cir. 1976); Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973) cert. den. 414 U.S. 1161. In addition the petitioner has included selected portions from the transcripts of the bankruptcy hearings. The quotations by the Court are greatly taken out of context. The statement by the Court that there is a severance of a tenancy by the entirety upon the filing of a bankruptcy petition is nothing but musings from the bench. After an additional hearing on December 14, 1983, and after the filing of Briefs by the parties, the Court made a formal written memorandum and order of April 12, 1984.

The transcripts of the bankruptcy hearings are replete with pronouncements by the Court that Massachusetts law determines the nature and extent of the debtor's interest in the real properties. The district court determined the debtor's estate had lack of such interest in the properties. Thus, the

requirement of §363(h)(3) before a sale was absent with this finding of the court. For it is the debtor's interest, if any, and only his interest in the realty which is included in the debtor's estate pursuant to 11 U.S.C. §541(a)(1) [See U.S. Court of Appeals Appendix A-98 to A-181].

3. The Respondent Eva Abdallah, As Owner Of The Real Property, Has Standing To Object To A Sale Pursuant To 11 U.S.C. §363(h)

The petitioner holds a judgment against the decedent debtor. Prior to the filing of the bankruptcy petition, the petitioner Drury commenced receivership proceedings against the assets of the debtor and his non-debtor spouse (your respondent Eva . Abdallah). The petitioner has no judgment or execution against Eva Abdallah.

The Massachusetts courts appoint a receiver for an individual under its general equity powers. The receiverships of individuals are of a limited type, Nolan,

Mass. Practice, Equitable Remedies §§163, 165. The purpose of such receiverships is to place the assets of the defendant into the possession and control of the court, Stockbridge v. Mixer, 215 Mass. 415, 102 N.E. 646 (1913). The property in the possession of a receiver is in custodia legis prior to any determination of rights in that property. C.J.S., Receivers §104.

While the possession and control of the property is placed into the hands of the receiver, title to such property is not affected by the appointment itself, Wellman v. North, 256 Mass. 496, 152 N.E. 886 (1926). The appointment of a receiver does not divest the owner of the title to the property, Bell v. American Protective League, 163 Mass. 558, 40 N.E. 857 (1895), for as C.J.S. Receivers §105 states:

> An ordinary receiver appointed under the general powers of the court does not, by the mere fact of his appointment, become vested

> with any title or estate in the property involved, since, as discussed supra, §104, he is a mere custodian thereof for the court... [footnote omitted].

In fact, the court in Wellman specifically distinguished those receivers in the state of New York who, by specific statutory authority, received title to the property.

The Massachusetts cases cited by your petitioner are distinguishable. The facts involve either a corporate receiver (not for an individual), or a receiver who was appointed pursuant to a narrow statutory authority. Massachusetts receivership proceedings are not an end in itself, but only to conserve assets pending further proceedings Wilson v. Waltham Watch Co., 293 F.2d 811, 814 (D.Mass. 1924) (applying Mass. law); Nigro v. First National Bank of Boston, 7 Mass.App. 705, 322 N.E.2d 782 (1975).

The state court receiver, as custodian of the debtor's interest in the properties, was

required to turn over such property to the trustee at the commencement of the case, 11 U.S.C. §543 (a), (b). Without the custody and control of the real property in question, it is the trustee who is without standing to assent to a sale of these properties.

In the case at bar, notification of all interested parties of their opportunity to be heard at a hearing is a requirement before a sale under §363, In re Robert L. Hallmore Corp., 40 B.R. 181 (Bank.Mass. 1984). Since the respondent Eva Abdallah hold an interest in the title to these real properties, she must be notified and heard before a sale of her interest in these properties, Fuentes v. Shevin, 407 U.S. 67 (1972); U.S. Constitution Amendment 5. Since the respondent Eva Abdallah retains title to these properties, due process mandates that she be afforded an opportunity to be heard before any such sale of her property under 11 U.S.C. §363(h). The bankruptcy court below was fully justified in

giving her such an opportunity, see 11 U.S.C. §543(c)(1).

CONCLUSION

The issue of title to these properties is still unresolved. This matter was remanded by the district court. This remand is for a clarification of a central, factual issue of the case. In addition, the First Circuit remanded to the district court for a determination of whether two of the appellants had timely filed their notices of appeal. The appellate courts should decide this matter as a whole, especially in light of the Court of Appeals' remand. Otherwise, the courts could well hear a second appeal by the same parties involving a similar related issue. This matter is premature for any appellate review. A consideration at this stage would involve unneccessary appeals and piecemeal review. Further, it would require additional judicial time and expense; the district court decision

is not "final" and appealable.

James M. Langan, Jr.
Counsel for Respondent

APPENDIX

U. S. CONSTITUTION, AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall be private property to be taken for public use, without just compensation.

11 U.S.C. §543(a)-(c)(1)

Turnover of Property by a Custodian

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor,

proceeds of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall--

(1) deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds of such property, that, at any time, came into the possession, custody or control of such custodian.

(c) The court, after notice and a hearing shall--

(1) protect all entities to which a custodian has become obligated with respect to such property...

RULE 8013

DISPOSITION OF APPEAL; WEIGHT ACCORDED BANKRUPTCY JUDGE'S FINDINGS OF FACT

On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.